

## Central Law Journal.

ST. LOUIS, MO., AUGUST 2, 1907.

### CONSERVING PRINCIPLES OF PROCEDURE.

We stated in the issue of this JOURNAL of July 5th (Vol. 65, p. 2), that we would take up the fourteen conserving principles of procedure as set forth by Mr. W. T. Hughes, in his most valuable work on Procedure, and during the next six months comment upon them in our editorials. We do not expect to bring out these principles in consecutive numbers of the JOURNAL, for many important matters are arising which need attention.

Originally, when cases were tried, there were no pleadings and no courts of review. Each party presented his case and the judgment of the judge settled the matter as far as the court was concerned. Judicial powers were in the King, and he himself heard the cases and gave judgment. But it became necessary for the King to delegate these powers, and in the process of time courts of appeal became established. Then it was that the necessity of knowing what had been before the *nisi prius* judge, in order that the courts of appeal might have a definite understanding of what had previously taken place, was discovered.

Pleadings in writing were then introduced and the plaintiff was confined to his written declarations of what constituted his cause of action, for, as stated in Mr. Hughes' work on Procedure, p. 8, as his first conserving principle: "Appellate courts or courts of errors and their jurisdiction and procedure, constitute important parts of the supreme law of the land. The Supreme Court of the United States may review judgments from the highest court of a state and all inferior federal tribunals. The means of this review are important incidents or implications. For it, pleadings are essential to present with certainty a subject matter so it may be *first viewed* and therefore *reviewed*. Pleadings must be certain to serve the high policies of procedure, of which requirements of appellate courts are among the most important. Consequently appears a remote relationship of constitutional law and of rules requiring certainty of pleading and also why those rules of cer-

tainty cannot be abolished." It must be kept constantly in mind that Mr. Hughes is showing how procedure is government, and how fully such rules, so simple in themselves, are yet most important functions of every stable government. They have been tested and approved by ages and this first rule laid down by Mr. Hughes, comprehends one which the Romans recognized as most important, that the *allegata* and *probata*, must correspond. In order to get this before a higher court there must be a record and one about which there is no uncertainty. The Roman laws were wrought out of the wisdom of ages previous to their civilization. They are the laws which today rule the world. It is more than probable that the builders of the pyramids had learned, practiced and promulgated the rule that the allegations and proof must correspond. But whether or not they did, it is certain that the rule was well established by the Roman law, which all previous governments, which had established laws, contributed to.

Illinois has established for Chicago, municipal courts, and the act of the legislature creating them provides that no written pleadings are necessary, and we understand that such a provision is now regarded as a great blunder by the Chicago bar. This goes to show that the requirement that the mutual altercations be in writing with rules as to certainty to govern, are wise provisions and are a part of every sound government, and necessary to its due process of law. The wisdom of the past says these rules cannot be abolished. Mr. Hughes says: "Here is a limitation of legislative power to interfere with the necessary means of the judicial department, also to interfere with the necessary incidents of principal powers enumerated and provided for in constitutions. \* \* \* The requirements of appellate procedure depend upon records and the best evidence; that record which should evince a fact should do so sufficiently and with certainty. Jurisdictional facts will not be presumed; judicial notice cannot be taken of them." It would seem from this that the Illinois legislature had gone beyond its powers in attempting to do away with a function of the court, which is derived from the constitution in the due process of law provision. Confusion must inevitably follow the failure to make the issues certain in such

a court, particularly in the courts of appeal. It is not strange, however, that in Illinois such a provision should have been made for the municipal courts of Chicago as that written pleadings are not required, for the theory of the case doctrine that the pleadings may be disregarded and a case made on the evidence and instructions, is a heresy which is fully established there, and crops out in various forms, to the great detriment of the jurisprudence of that state.

It is to be hoped that the bar will become so thoroughly roused to the insidious encroachments of this heresy, that the body politic will be purged of its putrid effects. Illinois needs a lot of purging. Judge Fox did a mighty good thing for Missouri when he held in the case of *Campbell v. Greer*, 197 Mo. 463, "legal proceedings affecting the title to real estate should in all things be regular and we are unwilling to consent to the precedent that the parties may agree upon the state of the pleadings and require this court to base its action either in affirming or reversing the judgment upon such an agreement. \* \* \* The circuit court of New Madrid county, where this case was tried, is the only court having power to supply the lost or destroyed records." No case that we have come upon illustrates more forcibly the importance of having the foundations clearly and definitely made, so that the appellate court may proceed with assurance that no injustice may be done because of uncertainty where jurisdiction was first obtained and the record made. Courts of appeal are courts of review in all matters where jurisdiction was obtained in the *nisi prius* courts. It then must appeal to every lawyer with great force, that the record called the clerk's record, or the record proper, is the mandatory record of vital importance in our scheme of government, for it discloses the jurisdiction which the court is bound to exercise in the due course of law.

#### NOTES OF IMPORTANT DECISIONS.

**SPECIFIC PERFORMANCE—ENFORCING CONTRACT IN THE ALTERNATIVE.**—Some interesting observations on the power of equity to specifically enforce contracts in the alternative are made in the recent case of *Taylor v. Mathews*, 44 So. Rep. 146, where the Supreme Court of Florida holds that where a bill is filed by the purchaser to enforce a contract for the purchase of real estate, it is not a

good ground of objection that the contract is in the alternative, when it provides that the vendor may elect between two or more certain, feasible, and proper alternatives as to the security he would reserve or take for the deferred payments.

The court delivers itself as follows on this question: "It is contended that the contract sought to be enforced was in the alternative, and that equity will not specifically enforce one of that character. The only case cited to sustain this contention is that of *Armour v. Connolly* (N. J. Ch.), 49 Atl. Rep. 1117, in which the vice chancellor decided that a contract to take down or remove a building within two weeks from the date the party of the first part shall vacate the premises was in the alternative, and specific performance would not be compelled in equity of that sort of a contract, especially on a bill filed some days before the expiration of the two weeks. This decision was reversed on appeal, but upon other grounds, and it does not appear that this doctrine was approved. *Armour v. Connolly*, 63 N. J. Eq. 788, 52 Atl. Rep. 383. The only authority cited by the vice chancellor to sustain his position is *Pomeroy on Specific Performance*, § 298 (text 302). This authority, it seems to us, is very far from sustaining him. The doctrine laid down by *Pomeroy* is that where an agreement consists of two or more parts in the alternative, and one or more becomes impossible of performance, or for some reason improper to be performed, a defendant will not be required to perform the other, because, in doing so, the court would take away his right of election and would thereby be making a contract for him. But even this doctrine has its qualifications as is shown in sections 299, 300, 301, 302. We have seen no authority which holds that the court, in decreeing specific performance, may not require a party to elect between two or more certain, feasible, and proper alternatives contained in his agreement. 26 Am. & Eng. Ency. of Law (2d Ed.), 30; *Fry on Specific Performance*, § 675; *Allender v. Evans-Smith Drug Co.*, 3 Ind. T. 628, 64 S. W. Rep. 558. If the facts of this case are such as take it out of this rule, they are not stated in the bill and should be set up in an answer.

We are of the opinion that it is not essential that the whole of the purchase money should have been paid by the complainant to entitle him to specific performance. He alleges that he has been given possession of the property under the verbal contract, and that he has expended labor and money upon its improvement in such sort as to give him the right of specific performance. *Pomeroy on Specific Performance* (2d Ed.), §§ 112 to 136, inclusive; *Waterman on Specific Performance*, §§ 268 to 282, inclusive; *Shouse v. Doane*, 39 Fla. 95, 21 So. Rep. 807. The complainant has not by his bill invoked the right to elect whether he himself will take a bond for title, or require a deed from the defendant *George H. B. Mathews* and give a mortgage to secure the notes. We are, therefore, not called upon to decide the question. 1 *Story on Contracts* (5th Ed.), § 815; 3 *Page on Contracts*, p. 2163; *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161."

PUBLICUM BONUM PRIVATE EST  
PREFERENDUM.\*

I.

The tendency of modern economic conditions is well expressed in this maxim as interpreted in its broad significance that:

"All private interests ever should give way,  
And public good bear universal sway."

And the law in its endeavor to meet the exigencies and the spirit of the times is undergoing a struggle to be consistent in the application of general fundamental principles to concrete cases. The spirit of the times finds its expression in popular opinion which is the result of the agitation of different individual, or groups of wills, emotions and intellects as typified in different ambitions, tastes and opinions. Passions and prejudices play an important part in the formation of popular opinion. This popular opinion is a fluctuating conception; it is neither uniform in time or content. Especially is this true in a government where local self-government is the dominant idea. The quality of popular opinion is judged by external standards. Locality and the personality of the community are important factors in the interpretation of popular opinion, and in the exercise of this popular opinion, as a law unto itself, limitations are placed upon it by certain fundamental conceptions of government which have so engrafted themselves in the national consciousness, the binding tie of all citizens, that any effort to legalize itself without sanction of the law is futile, yet it is not infrequent that a dominant opinion takes possession of the popular mind so forcibly that it penetrates into the remotest organization of the nation's life and stimulates popular opinion to action, so that the politics of a nation are recast and a change in the development and formulation of its laws is effected. Courts frequently deal with the dominant popular opinion in their interpretation of legislative will, for in a government where the dominant local self-government idea is prevalent every opinion tends to become a law. Although courts cannot inquire into the motive underlying the dominant opinion, yet, when viewed from certain general conceptions, they can either give it the

sanction of law, or nullify its legislative expression. The adequacy of a system of jurisprudence to cope with the exigencies and spirit of the times depends upon its ability to develop and expand with the growing and increasing needs and demands of a normal dominant opinion. As illustrations of the process by which legal principles are developed and by which the expansiveness of our system of law is shown, the following quotations will suffice: In *Butchers' Union, etc., Co. v. Crescent City, etc., Co.*,<sup>1</sup> the court said: "We are not prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals."<sup>2</sup> This cautionary declaration received the unanimous concurrence of the court and a year later the principle became the foundation of the decision in the case of *Beer Co. v. Massachusetts*,<sup>3</sup> and as to the expansiveness of the law Mr. Justice Matthews in *Hurtido v. California*,<sup>4</sup> said: "This flexibility and capacity for growth is the peculiar boast and excellence of the common law. \* \* \* The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations, and of many tongues." And in *Missouri v. Louis*,<sup>5</sup> Mr. Justice Bradley said: "We might go still further and say, with undoubted truth, that there is nothing in the constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory." In all governments the political, economic, and social forces act and react upon one another in accordance with the physical, psychical and moral forces. It is essential to bear in mind that these forces are so interrelated and interwoven with each other that a forcible assertion of the one carries with it the active or reactive elements of one

<sup>1</sup> 111 U. S. 746, 4 Sup. Ct. Rep. 652.

<sup>2</sup> *Moore v. State*, 48 Miss. 147; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 663.

<sup>3</sup> 97 U. S. 28.

<sup>4</sup> 104 U. S. 516, 4 Sup. Ct. Rep. 118.

<sup>5</sup> 101 U. S. 22.

\* The discussion of this subject will be continued in the next two issues of the CENTRAL LAW JOURNAL.

or more, or of all of the others, and often may rise to a point where it becomes a dominant power so as to form a new permutation or combination of these forces in the structure of the social organization. It is these economic forces that are tending to foster a particular theory to the exclusion of all others that is bringing on the struggle between individualism and collectivism by creating a sort of paternalism over the individual, and this is manifest in the fact that individual interests, purely as such, are slowly clobbering toward the vanishing point, while the corporate and quasi-public interests are expanding in the conflict between these interests and the purely public interests. Equally true is this assertion in the domain of law. Individual liberty and rights are slowly narrowing down to the vanishing point, while the tendency is to expand the public rights. In illustration of this the many decisions upholding statutes regulating some of the various vocations and callings in life, contracts of employment between employer and employee, hours of labor, payment of wages, manufacture of foods, beverages, etc., etc., will suffice, and to show the effect of these laws upon fundamental principles and rights, quotations will be made from various decisions and opinions of individual justices. In *Mugler v. Kansas*,<sup>6</sup> in his dissenting opinion, Mr. Justice Field said: "The court is not to determine whether the place is a common nuisance in fact, but is to find it to be so if it comes within the definition of the statute, and having thus found it, the executive officers of the court are to be directed to shut up and abate the place by taking possession of it, and, as though this were not sufficient security against the continuance of the business, they are to be required to destroy all the liquor found therein, and all other property used in keeping and maintaining the nuisance. It matters not whether they are of such a character as could be used in any other business, or be of value for any other purposes. No discretion is left in the judge or in his officer. These clauses appear to me to deprive one who has a brewery and manufactures beer for sale, like the defendants, of property without due process of law. The destruction to be ordered is not a forfeiture upon conviction of any of-

fense, but merely because the legislature has so commanded, assuming which is not conceded, that the legislature in the exercise of that undefined power of the state, called its "police power," may, without compensation to the owner, deprive him of the use of his brewery for the purposes for which it was constructed under the sanction of the law, and for which alone it is valuable. I cannot see upon what principle, after closing the brewery, and thus putting an end to its use in the future for manufacturing spirits, it can order the destruction of the liquor already manufactured, which it admits by its legislation may be valuable for some purposes, and allows it to be sold for these purposes. Nor can I see how the protection of the health and morals of the people of the state can require the destruction of property, like bottles, glasses, and other utensils which may be used for many lawful purposes. It has heretofore been supposed to be an established principle that where there is a power to abate a nuisance the abatement must be limited by its necessity, and no wanton or unnecessary injury can be committed to the property or rights of individuals. Thus, if the nuisance consists in the use to which a building is put, the remedy is to stop such use, not to tear down or to demolish the building itself, or to destroy property found within it.<sup>7</sup> The decision of the court, as it seems to me, reverses this principle. It is plain that great wrong will often be done manufacturers of liquor if legislation like that embodied in this 13th section can be upheld. The Supreme Court of Kansas admits that the legislature of the state, in destroying the value of such kinds of property, may have gone to the utmost verge of constitutional authority. In my opinion it has passed beyond that verge and crossed the line which separates regulation from confiscation." On some of these points, in the majority opinion, the court said: "The court is not required to give effect to a legislative 'decree' or 'edict,' unless every enactment by the lawmaking power of a state is to be so characterized. It is not declared that every establishment is to be deemed a common nuisance because it may have been maintained prior to the passage of the statute as a place for manufacturing intoxi-

<sup>6</sup> 123 U. S. 620, 8 Sup. Ct. Rep. 273.

<sup>7</sup> *Babeock v. City of Buffalo*, 50 N. Y. 268; *Bridge Co. v. Page*, 83 N. Y. 187.

ating liquors. The statute is prospective in its operation; that is, it does not put the brand of a common nuisance upon any place unless, after its passage, that place is kept and maintained for purposes declared by the legislature to be injurious to the community. Nor is the court required to adjudge any place to be a common nuisance simply because it is charged by the state to be such. It must first find it to be of that character, that is, must ascertain in some legal mode whether, since the statute was passed, the place in question has been, or is being, so used as to make it a common nuisance." Again the court said: "It is contended that, although the state may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, 'no convention or legislature has the right under our form of government to prohibit any citizen from manufacturing for his own use, or for export or storage, any article of food or drink not endangering or affecting the rights of others.' \* \* \* It will be observed that the proposition and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the conditions that such manufacturer does not endanger or affect the rights of others. If such manufacturer does prejudicially affect the rights and interest of the community, it follows from the very premises stated, that society has the power to protect itself by legislation against the injurious consequences of that business." The inference to be drawn from these quotations is apparent. As to the latter it is not only manifest that the general right to manufacture and sell the product is prohibited, but the right to manufacture for one's own personal use may be abrogated without limitation. In *Jacobson v. Massachusetts*,<sup>8</sup> the court said: "The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and therefore hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the exaction of such a law against one who objects to vaccination, no matter for

what reason, is nothing short of an assault upon his person. But the liberty secured by the constitution of the United States to every person within its jurisdiction does not impart an absolute right in each person to be at all times and in all circumstances wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. \* \* \* In the constitution of Massachusetts, adopted in 1780, it was laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for 'the common good,' and that government is instituted 'for the common good, for the protection, safety, prosperity and happiness of the people, and not for the profit, honor, or private interests of any one man, family, or class of men.' \* \* \* The liberty secured by the fourteenth amendment consists in part, in the right of a person 'to live and work where he will,'<sup>9</sup> and yet he may be compelled, by force if need be against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense."

In *Crowley v. Christensen*,<sup>10</sup> the court said: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the 'equal' enjoyment of the same rights by others. It is then, liberty regulated by law." In *Lochner v. New York*,<sup>11</sup> the court held that the limitation of employment in bakeries to sixty hours a week and ten hours a day

<sup>8</sup> *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. Ed. 882, 17 Sup. Ct. Rep. 427.

<sup>10</sup> 137 U. S. 86, 34 L. Ed. 620, 11 Sup. Ct. Rep. 13.

<sup>11</sup> 197 U. S. 25, 25 Sup. Ct. Rep. 539.

<sup>6</sup> 197 U. S. 11, 25 Sup. Ct. Rep. 358.

is an arbitrary interference with the freedom to contract guaranteed by the fourteenth amendment of the United States constitution. The court said: "The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the fourteenth amendment of the federal constitution.<sup>12</sup> Under that provision no state can deprive any person of life, liberty or property without due process of law. The right to purchase or sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. \* \* \* The state, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the federal constitution offers no protection. If the contract be one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the fourteenth amendment. Contracts in violation of a statute, either of the federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the federal constitution, as coming under the liberty of person or free contract. Therefore, when the state, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employee), it becomes of great importance to determine which shall prevail,—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the state." Mr. Justice Holmes in his dissenting opinion, said: "The liberty of the citizen to do as he likes so long as he does not

interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. \* \* \* But a constitution is not intended to embody a particular economic theory, whether of individualism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally different views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the constitution of the United States." In *Commonwealth v. Hamilton Manufacturing Co.*,<sup>13</sup> where a similar law was in question, the court said: "The law, therefore, violates no contract with the defendant, and the only question is, whether it is in violation of any right reserved under the constitution to the individual citizen. Upon this question there seems to be no room for debate. It does not forbid any person, firm or corporation from employing as many persons or as much labor as such person, firm or corporation may desire, nor does it forbid any person to work as many hours a day or week as he chooses. It merely provides that an employment, which the legislature has evidently deemed to some extent dangerous to health, no person shall be engaged in labor more than ten hours a day or sixty hours a week. There can be no doubt that such legislation, if it were necessary to resort to either of these sources for power, would be constitutional. This principle has been so frequently recognized in this commonwealth that reference to the decisions is unnecessary." But it may be noted here that this decision was rendered under the clause quoted above, embodied in the constitution of Massachusetts. Again in *Holden v. Hardy*,<sup>14</sup> the court gave sanction to the following quotation: "The state still retains an interest in the citizen's welfare, however reckless he may be. The whole is greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer." The inference to be

<sup>12</sup> *Allgeyer v. Louisiana*, *supra*.

<sup>13</sup> 120 Mass. 383.

<sup>14</sup> *Supra*.

drawn from what has been said is the tendency in law to enlarge the public rights as against the individual rights, and in that a strictly personal right may be destroyed, instead of maintained, where under the circumstances and in a concrete case, the public exercise of the right is prohibited. Statutes interfering with the general economic right as defined in the fourteenth amendment have been upheld upon the grounds of emergency, of equalizing the relation between employees and employers when the former were at a disadvantage in matter of wages, of preventing practice of fraud and deception, of declaring certain work on Sunday not to be work of charity, and so forth. In *Jacobson v. Massachusetts*,<sup>15</sup> where the subject of public health is in question, the court makes the following significant statement: "It is a case of an adult who, for aught that appears, was himself in perfect health, and a fit subject of vaccination, and yet, while remaining in the community refused to obey the statute and the regulation adopted in execution of its provisions, for the protection of the public health and the public safety, is confessedly endangered by the presence of a dangerous disease." In *Lochner v. New York*,<sup>16</sup> the trend of modern legal thought in relation to modern economic tendencies is well indicated in the following statement: "It is a question of which of two powers or rights shall prevail, the power of the state to legislate or the right of the individual to liberty of person and freedom of contract." These quotations have been indulged in for the sole purpose of giving the exact expressions and opinions of the courts and opinions of individual justices upon the questions involved, and in so doing the aim has been to present the matter as fully as possible. The leading cases in which laws were upheld interfering with the right of personal liberty and freedom of contract are: *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273; *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780, 18 Sup. Ct. Rep. 383; *Atkins v. Kansas*, 191 U. S. 207, 48 L. Ed. 148, 24 Sup. Ct. Rep. 124; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. Ed. 55, 22 Sup. Ct. Rep. 1; *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. Rep. 358; *Petit v. Minnesota*,

177 U. S. 154, 44 L. Ed. 716, 20 Sup. Ct. Rep. 666, and the leading cases in which the right of personal liberty and freedom of contract were upheld are: *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 666, 17 Sup. Ct. Rep. 255; *Lochner v. New York*, *supra*; *People v. Peattie*, 89 N. Y. Supp. 193; *Bessette v. People*, 193 Ill. 334, 56 L. R. A. 558, 62 N. E. Rep. 216; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. Rep. 354; *Low v. Rees Printing Co.*, 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670, 59 N. W. Rep. 362. In some of the above cases the courts call attention to the fact that in emergency cases the state has such rights as to force citizens to military services, to aid in quelling riots, to assist in making arrests, to be quarantined, to serve on juries, etc., etc., which again has a tendency to show the influence of the spirit of the times upon legal development.

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#### CRIMINAL LAW—BURDEN OF PROVING NEGATIVE AVERMENT IN INDICTMENT.

MCDONALD v. STATE.

*Supreme Court of Arkansas, May 13, 1907.*

In a trial for carrying a weapon under Act April 1, 1881 (Laws 1881, p. 191), providing a penalty for carrying as a weapon any pistol, etc., except such pistols as are used in the United States army or navy, etc., the burden is on the state to prove that it was not such a pistol as is used in the army or navy.

In a trial for carrying a weapon under Act April 1, 1881 (Laws 1881, p. 191), providing a penalty for carrying as a weapon any pistol, etc., except such pistols as are used in the United States army or navy, if the pistol was such as is used in the army or navy, it was not necessary for defendant to prove that he carried it in his hand before he could be acquitted.

BATTLE, J.: The following indictment was presented by the grand jury of Little River county, at the January, 1905, term of the Little River circuit court: "The grand jury of Little River county, in the name and by the authority of the state of Arkansas, accuse J. A. McDonald of the crime of carrying concealed weapons, committed as follows, to-wit: The said J. A. McDonald, in the county and state aforesaid, on the 15th day of April, A. D. 1904, did unlawfully carry a pistol as a weapon, said pistol not being such a pistol as is commonly used in the army or navy of the United States against the peace and dignity of the state of Arkansas."

This indictment was based upon section 1 of the act entitled "An act to preserve the public

<sup>15</sup> *Supra*.

<sup>16</sup> *Supra*.

peace and prevent crime," approved April 1, 1881 (Laws 1881, p. 191), which is as follows: "Any person who shall wear or carry in any manner whatever as a weapon, any dirk, or bowie knife, or a sword, or a spear in a cane, brass or metal knucks, razor, or any pistol of any kind whatever, except such pistols as are used in the army or navy of the United States, shall be guilty of a misdemeanor. Provided, officers whose duties require them to make arrests or to keep and guard prisoners, together with the persons summoned by such officers to aid them in the discharge of such duties, while actually engaged in such duties are exempted from the provisions of this act. Provided, further, nothing in this act be so construed as to prohibit any person from carrying any weapon when upon a journey or upon his own premises." Section 2, page 192, of the same act is as follows: "Any person, excepting such officers, or persons on a journey, and on his premises, as are mentioned in section one of this act, who shall wear or carry any such pistol as is used in the army or navy of the United States, in any manner, except uncovered and in his hand, shall be deemed guilty of a misdemeanor." The carrying of such pistols as are used in the army or navy of the United States in any manner is not an offense under section 1. The carrying of it in any manner except uncovered and in the hand is made a separate offense by section 2, which is held to be constitutional in *Haile v. State*, 38 Ark. 564, 42 Am. Rep. 3.

It was proved that McDonald carried a pistol about the 15th of April, 1904, and it was exhibited in court and to the witnesses of the state at the time they saw him with it. The question was: Was it such a pistol as is used in the army or navy of the United States? McDonald testified that it was a 41 Colt pistol on a 45 frame, and that it was such a pistol as the Arkansas State Militia carried about a year before he was testifying. Jim Sanderson testified that the pistol used in the army of the United States in 1898 was a 38 on a 45 frame. He did not know the size used at the time of testifying.

Among other instructions the court gave the following, over the objections of the defendant: "(3) The court tells the jury that, the carrying of the pistol being admitted by defendant or proven beyond a reasonable doubt as charged in the indictment, then the law presumes that said pistol was carried as a weapon, and the burden is upon defendant to show that said pistol was not carried as a weapon, or was such a pistol as is commonly used in the army and navy of the United States, and carried open in the hand." The jury found the defendant guilty, and assessed his fine at \$50, and he appealed.

In *State v. Ring*, 77 Ark. 139, 91 S. W. Rep. 11, it was held that it was necessary to allege in an indictment for unlawfully carrying a pistol as a weapon that it was not such a pistol as is used in the army or navy of the United States. The court in that case said: "The exception (that is, so

much of the statute as excepts the army or navy pistol) being in the enacting clause of the statute, it is an essential part of the offense, and must be negated in the indictment, in order that the description of the offense may correspond with the terms of the statute. It is otherwise where the exception appears in a statute by way of proviso in a separate clause. *Bone v. State*, 18 Ark. 109; *Matthews v. State*, 24 Ark. 484; *Wilson v. State*, 33 Ark. 557, 34 Am. Rep. 52."

The exception being an essential part of the offense, the burden was upon the state in this case to prove it in order to convict the defendant of the offense of unlawfully carrying the pistol. *Hopper v. State*, 19 Ark. 143. There was no reason for saying that the burden was upon the defendant, because it was a matter peculiarly within his knowledge; for the pistol was exhibited in court and to the witnesses who testified in behalf of the state at the time they saw him with it.

It was not clearly shown by the evidence that the pistol carried by appellant about the 15th of April, 1904, was an army or navy pistol. The evidence leaves it in doubt. In view of this fact, the instruction of the court telling the jury the burden was on the defendant to prove that it was such a pistol was prejudicial. It was erroneous and prejudicial in another respect. It, in effect, told the jury that, if it was such a pistol, it was necessary for the defendant to prove that he carried it in his hand before they could acquit. That is not true. He was not indicted for unlawfully carrying an army or navy pistol. Such an act is a separate and distinct offense from that charged; and, if it had been, the burden would have been on the state to prove that it was not carried in the hand.

Reversed and remanded for a new trial.

Hill, C. J., dissents.

HILL, C. J. (dissenting). Mr. Greenleaf says: "Where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless unless disproved by that party. Such is the case in civil and criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons except those who are duly licensed therefor." 1 Greenleaf on Evidence, § 79. Mr. Wharton says: "Where in a statute an exception or proviso qualifies the description of the offense, the general rule is, as has been seen, that the indictment should negative the exception or proviso. In such cases, when the subject of the exception relates to the defendant personally or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the defendant as a matter of defense." 1 Wharton on Criminal Law, § 614. The statute makes the wearing or carrying as a weapon of a pistol of any kind whatever a misdemeanor, except "such pistols as are used in the army or navy of the United States." The gist of the of-

fense is the carrying of a weapon. And the kind of weapon is a matter that is peculiarly within the knowledge of the man who carries it. If he carries an army or navy pistol, he must carry it open in his hand. Section 1610, Kirby's Dig.

How any class of cases can be more entirely within the rule laid down in the text-books above quoted I am unable to see. The subject of this exception, the kind of pistol carried by the defendant, is a matter personal to himself and peculiarly within his knowledge; and the rule is uniformly that in such instances it is not the duty of the prosecutor to prove the matter in the exception, but, owing to the difficulty of proof on behalf of the state and the readiness of proof on behalf of defendant, the burden is thrown upon the defendant to prove the matter in the exception or proviso.

Under this decision, if a man is seen with a pistol sticking out of his pocket, and no more of it disclosed than that it is a pistol, the state loses its case because it is unable to prove that it is not a pistol used in the army or navy of the United States; and in my opinion this rule is subversive to the elemental rules of law involved, and unfortunately may paralyze the salutary law against the carrying of pistols.

**NOTE—Pleading and Proving a Negative or an Exception in a Criminal Statute.**—Where a statute in attempting to describe an offense provides certain exceptions or conditions upon the existence of which the statute shall have no application, the question arises: Shall the prosecution plead and prove such exceptions or provisos or are they matters of defense for which the defendant is responsible and must establish by proper evidence? It is true that the majority of courts, as in the principal case, cut this Gordian knot in a manner quite as direct as that of Alexander the Great, when they announce the rule that if the exception or proviso occurs in the enacting clause the prosecution must plead and prove the exception, but if it appear in a subsequent clause, it becomes a matter of defense for the defendant to establish. *State v. Abbott*, 31 N. H. 434; *Elkins v. State*, 13 Ga. 455; *Britton v. State*, 10 Ark. 299; *Villines v. State*, 96 Tenn. 141; *Williams v. People*, 20 Ill. App. 92; *State v. Price*, 71 N. J. L. 249, 58 Atl. Rep. 1015; *Alexander v. State*, 48 Ind. 394; *Commonwealth v. Hildreth*, 17 Ky. L. Rep. 1124, 33 S. W. Rep. 838; *Kline v. State*, 44 Miss. 317; *Hinckley v. Penobscot*, 42 Me. 89; *Barbar v. State*, 50 Md. 161; *People v. Phippin*, 70 Mich. 6, 37 N. W. Rep. 888; *State v. Raymond*, 54 Mo. App. 425; *State v. Lyons*, 3 La. Ann. 154; *State v. Bloodworth*, 94 N. Car. 918; *Byrne v. State*, 12 Wis. 519; *Williams v. State*, 37 Tex. Cr. Rep. 238, 39 S. W. Rep. 664; *Commonwealth v. Hill* 5 Gratt. (Va.) 682; *State v. Van Vliet*, 92 Iowa, 476; *State v. Thompson*, 2 Kan. 432. Many other cases could be cited but it would be useless to do so as they are accessible to lawyers of every state.

This rule is so simple as not to require even one versed in the law to apply it; any good English grammarian can tell at once whether the state or the defense should allege and prove a negative contained in a criminal statute. Thus while the rule is very simple and has in its favor absolute exactness thus making the matter of its application easy of determination, it

has this against it, *i. e.*, that it makes the burden of proof vacillate with the whim or clumsiness of a legislator in drawing up the particular statute. Suppose, for instance, that a matter which is clearly matter of defense is inserted by a bungling legislator in the enacting clause instead of in a proviso, the courts holding fast to this open and shut rule must hold that the state allege and prove such matter of defense because it occurs in the enacting clause and must be averred "in order to describe the offense in the terms of the statute."

Many courts, and law writers however, have departed from such a superficial rule alleging it to be too universal and not applicable in all cases, and that "it adheres too closely to the letter, omitting the spirit of the doctrine." *United States v. Cook*, 17 Wall. 168, *State v. O'Donnell*, 10 R. I. 472; *State v. Ah Chew*, 16 Nev. 50, 40 Am. Rep. 488; *State v. Abbey*, 29 Vt. 60; *State v. Rush*, 13 R. I. 198; *State v. Railroad Co.*, 50 W. Va. 235, 40 S. E. Rep. 447; 1 *Bishop's New Criminal Procedure*, sec. 635. In the case of *United States v. Cook*, the learned judge says: "Text writers and courts of justice have sometimes said, that if the exception is in the enacting clause, the party pleading must show that the accused is not within the exception, but where the exception is in a subsequent section or statute, that the matter contained in the exception is matter of defense and must be shown by the accused. Undoubtedly that rule will frequently hold good, and in many cases prove to be a safe guide in pleading, but it is clear that it is not a universal criterion, as the words of the statute defining the offense may be so entirely separable from the exception that all the ingredients constituting the offense may be accurately and clearly alleged without any reference to the exception. *Commonwealth v. Hart*, 11 Cush. 132. Cases have also arisen, and others may readily be supposed, where the exception, though in a subsequent clause or section, or even in a subsequent statute, is nevertheless clothed in such language, and is so incorporated as an amendment with the words antecedently employed to define the offense, that it would be impossible to frame the actual statutory charge in the form of an indictment with accuracy, and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause, section or statute. Obviously such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation, and would also be defective for want of clearness and certainty."

While it is quite probable that the rule as sustained by the weight of authority often leads to the correct conclusion and exact justice, this result is to be attributed to the fact that exceptions and negative averments absolutely necessary to the offense charged are usually incorporated in the enacting clause by experienced legislators, while provisos and matters of defense are usually inserted in subsequent clauses, clearly differentiated from that clause which describes the offense. But other statutes are sometimes more loosely drawn and matters of defense are sometimes inserted in the enacting clause, as in *State v. Ah Chew*, 16 Nev. 50, where the statute provided that "it should be unlawful for any person or persons, as principals or agents, to sell, give away, or otherwise dispose of any opium in this state, except druggists, and druggists shall sell it only on the prescription of legally practicing physicians." Here is an example of a very loosely drawn statute and the general rule sustained by the weight of authority would compel the exception

in this case to be pleaded. The indictment would have to allege that defendant was not a druggist, or if a druggist, that the drug was not sold on the prescription of a physician, or if sold on prescription, that the physician writing the prescription was not duly licensed to practice. It is evident that all of these matters of exception are matters of defense. The law makes it a crime for any person to sell opium, even druggists. Under certain conditions, however, a sale by a druggist does not constitute a crime. These conditions are wholly within the knowledge of the defendant and can easily be set up and proven as a part of his defense. The Supreme Court of Nevada held therefore that it was not necessary for the indictment to show that the defendant was not within the exceptions specified in the statute. The court said: "From a careful examination of the authorities we are of opinion that it is only necessary in an indictment for a statutory offense to negative an exception to the statute when the exception is such as to render the negative of it an essential part of the definition or description of the offense charged. It is the nature of the exception and not its locality that determines the question whether it should be stated in the indictment or not. The exception stated in this section does not define or qualify the offense created by the statute. The defendant cannot complain that he has not been fully informed of the nature and cause of action against him. The question is not one only of pleading but of evidence, and where the exception need not be negated it need not be proven by the prosecution. If the defendant was a druggist, and sold the opium upon a prescription of a legally practicing physician it would be a defense. These facts would be peculiarly within his knowledge and 'could be established by him without the least inconvenience, whereas, if proof of the negative was required the inconvenience would be very great.'" Citing, 1 Greenleaf on Evidence, sec. 79; State v. Abbey, 29 Vt. 66; Metzker v. People, 14 Ill. 101; Stanglein v. State, 17 Ohio St. 461; State v. Miller, 24 Conn. 522; State v. Glynn, 34 N. H. 422.

#### JETSAM AND FLOTSAM.

##### THE JURY.

I see the jury going out.  
 Their faces set and stern  
 Look neither to the right nor left,  
 As down the aisle they turn.

Kept under guard and lock and key  
 These guardians of our fate  
 Maintain the strictest secrecy  
 While they deliberate.

For weeks the trial dragged along.  
 Vast sums the trial cost.  
 The parties now expectant wait  
 To know which one has lost.

The moments lengthen into hours;  
 The hours bring but delay.  
 No mortal ventures to predict  
 What those twelve men will say.

At times from out the jury room,  
 Come loud, tempestuous strains;  
 And then the silence of the tomb  
 Within that precinct reigns.

Eleven stubborn men hold out  
 Against a single one,  
 Whose most unreasonable doubt  
 A verdict has undone.

Now when that jury is coming in  
 To say they disagree  
 (Although the case is plain as day)  
 I'll not be there to see.

#### LIQUORS NOT ORDERED SHIPPED C. O. D.

Some of the devices by which to evade the state liquor laws of the states, under the guise of interstate commerce, are described in some recent Kentucky cases that have just been decided by the United States Supreme Court. *Adams Exp. Co. v. Kentucky*, 27 Sup. Ct. Rep. 606. There was evidence in these cases that whisky shipped from Cincinnati by express C. O. D. to persons in Kentucky had not been ordered by the consignees, and the contention on the part of the state was that such shipments were not protected from state laws as interstate commerce. Unfortunately for the prosecution, however, the evidence to this effect was rendered immaterial by an averment in the indictment which declared that the shipments were made by the express company as a common carrier in the usual course of its business. Mr. Justice Harlan dissented on the ground that the cases did not constitute legitimate interstate commerce, but only devices or tricks of the express company to evade or defeat the laws of Kentucky relating to intoxicating liquors. There was a further contention by the state that, as the agent of the express company agreed, on the request of the consignee, to hold the package for some days, it lost its character of interstate commerce during this detention. But this contention was denied on the authority of *Heyman v. Southern R. Co.*, 203 U. S. 270, 27 Sup. Ct. Rep. 104, where it was held that goods from another state did not lose their character as interstate commerce until delivery to the consignee. Whatever the local law might be as to the time when the carrier's liability should end, the question as to the character of goods shipped by express from another state to one who has not ordered them, it will be seen, is left still open by the present cases; so that, under proper averments in the indictment, and clear proof that the carrier took the goods, knowing that they were not ordered by the consignee, the court may still find that the shipment is not protected as an interstate transaction.—*Case and Comment.*

#### CONSTITUTIONALITY OF LEGISLATION AFFECTING CORPORATIONS EXCLUSIVELY.

It has been peremptorily decided that corporations as well as natural persons are within the protection of the fourteenth amendment (*Santa Clara County v. R. R.*, 118 U. S. 394, 396; *R. R. v. Nebraska*, 164 U. S. 403); but, like natural persons, they are subject to regulation by the states under the police power, which cuts across that amendment. May police regulations, however, be put upon corporations exclusively? Undoubtedly under the police power there may be classification, but it must be based on some reasonable distinction. In the earlier cases in the United States Supreme Court, the rule was loosely laid down that "special legislation is not class legislation if all persons brought under its influence are treated alike under the same conditions." *Missouri Pac. R. R. v. Mackey*, 127 U. S. 205, 209. The later cases define the rule more

sharply, and require further that the legislation in its classification bring within its influence all who are under the same conditions. *Connolly v. Union Sewer Co.*, 184 U. S. 540; *R. R. v. Ellis*, 165 U. S. 150. By this test regulations concerning corporations solely, when correcting evils arising only from corporate enterprises, would be constitutional. No doubt it is on this ground that statutes abolishing the fellow servant rule with regard to railroad corporations (for a collection of these statutes, see 2 Labatt, Master and Servant, § 743 *et seq.*), are to be upheld; the hazards of railroading afford a reason for the discrimination, and the court takes judicial notice that railroads are exclusively run by corporations. See *Ballard v. Miss Cotton Oil Co.*, 81 Miss. 507, 569. It must be admitted, however, that some courts have sustained these statutes on the ground that the word "corporation" therein is to be construed as also including natural persons. *Pittsburgh, etc., R. R. v. Lighthouse (Ind.)*, 78 N. E. Rep. 1033; *Schub v. Powers-Simpson Co.*, 85 Minn. 447. On the other hand, where the evils sought to be checked are incident to private as well as corporate enterprises, laws applicable only to corporations would clearly be unconstitutional. *Ballard v. Miss Cotton Oil Co.*, *supra*. See *Lavalle v. R. R.*, 40 Minn. 249, 252. And such was the holding of a recent Indiana case where the statute required railroad and other corporations to answer in damages for injuries to employees caused by superior servants. *Bedford Quarries Co. v. Bough*, 80 N. E. Rep. 529. There is no reason in the nature of things why corporations should be treated differently in this respect from large partnerships, such as some express companies, or from individuals.

There is a way, however, in which corporations can be regulated differently from individual enterprises. Today practically every corporation holds its charter subject to amendment, alteration, or repeal by the legislature, at least when the public interest requires it. The law is settled that neither property nor vested rights of a corporation can be taken, without compensation, by the exercise of this power, nor can the aim of the charter be so changed as to alter the original purpose of the grant. *Lake Shore, etc., R. R. v. Smith*, 173 U. S. 84, 698. But laws such as that in the present case do not transgress any of these limitations, and so could be imposed on domestic corporations under this power of amendment. Similar regulations could be placed upon foreign corporations as a condition precedent to their right to do business within the state,—at least where the business is not interstate commerce.—for a state can exercise unhampered discretion with respect to such privilege. *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28; *Hancock Mut. Life Ins. Co. v. Warren*, 181 U. S. 73, 76. The question then remains, how statutes like the present, general in their wording, are to be construed. Some cases, including the principal case, hold that they can not be construed as amendments to the incorporation laws, since they are applicable to foreign as well as domestic corporations. *Johnson v. Goodyear Mining Co.*, 127 Cal. 4. Ignoring this objection, other courts construe them as such amendments. *Shaffer & Munn v. Union Mining Co.*, 55 Md. 74; *State v. Brown & Sharpe*, 18 R. I. 16; *R. R. v. Paul*, 64 Ark. 83, affirmed 173 U. S. 404. Why could not these statutes be held to fulfill at once the twofold function of an amendment to the incorporation laws and a regulation of the permission to foreign corporations to do business within the state? It is a maxim of constitutional law that a decent respect for the legislature and the proper bal-

ance of the powers of government require the judiciary not to declare a law unconstitutional unless the necessity is obviously compelling. Therefore, in the absence of statutory (see *Braceville Coal Co. v. People*, 147 Ill. 66; *State v. Haun*, 61 Kan. 146) or constitutional provisions, such as those of *Indiana (Burns' Ann. Ind. Stat., §§ 115, 117)*, regulating the amendment of laws and the enactment of statutes, general laws such as the one under discussion should be upheld on the twofold basis suggested.—*Harvard Law Review*.

## CORRESPONDENCE.

### A CRITICISM.

*Editor of the Central Law Journal:*

As a subscriber to and reader of the CENTRAL LAW JOURNAL from its beginning, I doubt not that I will be permitted to call attention to an error in its quotation. The error is not in the words but in the time and place. Please look at No. 25, Vol. 64, page 482, near the conclusion of your article, entitled *Salus Populi Suprema Lex*, you quote:

"Go tell the Spartans, thou that passest by,  
That in obedience to her laws, here we lie,"

and refer it to Marathon, as if Spartans had fallen there. No Spartans were in the battle of Marathon. The moon was not right for them to march earlier than they did, and hence they arrived in Attica three days after the battle. Of Greeks, only Athenians and Platæans fought at Marathon. The quotation refers to Leonidas and his 300 Spartans who fell at Thermopylæ. See Herodotus, Book VII. (Polymnia), sec. or paragraph 228. In Cary's translation, published by Harper & Brothers in 1855, you will find it on page 489, lines 2 and 3 from the top.

Very respectfully,

Liberty, Mo.

D. C. ALLEN.

The foregoing maxim was from the epitaph to Leonidas. Mr. Allen's criticism is right.—ED.

IS A LAWYER JUSTIFIED IN ACTING AS ATTORNEY FOR A DISHONEST CLIENT IN A SUIT IN PURSUANCE OF THE CLIENT'S DISHONEST PURPOSES?

*Editor of the Central Law Journal:*

In the incipency of a lawyer's employment it is not always possible for him to know whether his client has a justifiable case or not, and in many instances he must proceed very far with his case before such information is obtainable. Some latitude must also be allowed for difference of opinion as to what is, or is not, a justifiable contention, but after excluding these two contingencies should a lawyer accept employment in a civil case palpably at variance with morality and honesty. The common law in principle, at least, is not administered in a manner to encourage and extend litigation, and 't must be admitted that most of the rulings from the bench are in consonance with this principle, but should not judges go further and stamp with their disapproval the lawyers who persistently take up the time of the courts by appearing for clients whose cases possess no semblance of justice or equity. Why should taxpayers be compelled to maintain courts for purposes so unjustifiable? It cannot be denied that quite too many of the civil suits instituted should unsuccessfully hunt for lawyers willing to enlist themselves in their behalf, and when

their unjust features develop in the trial court, the attorneys so employed, should be severely reprimanded. Such offenses on the part of members of the bar, would, of course, be palliated upon as showing that deception had been used by the client as to the nature of his case, and a discerning judge would have but little difficulty in determining as to the genuineness of such an excuse. Persistent appearances of attorneys in this class of cases should justify proceedings for their disbarment.

It is obvious that no legislative enactments can be devised to meet this class of offenses, but courts under the broad principle that every wrong should have a remedy, may reasonably expand their discretionary powers sufficiently to cover the evil. Courts are instituted to diminish not to enlarge wrong-doing, and the honest defendant who has committed no wrong should not be put to expense to gratify the experiments or revenge of the dishonest plaintiff who perhaps in addition to his dishonesty has more boldness and bluff in his makeup than the honest defendant, and who, like the holder of a pair of deuces in a game of poker, may effectually win money from the holder of three aces.

Let our judges consider this growing wrong. Let our bar associations make suggestions with the view of diminishing the evil.

C. W. H.

St. Louis, Mo., July 15.

#### BOOK REVIEWS.

##### WILCOX ON FRAILTIES OF THE JURY.

It is no exaggeration to say that Hon. Henry S. Wilcox, an old and honored practitioner at the Chicago bar, has put the profession under heavy obligations in the three very interesting and instructive volumes which he has put out as creatures of his wonderful brain and long experience, to-wit: *Foibles of the Bench*, *Foibles of the Bar*, and *Frailties of the Jury*. We are here to review the last of these truly great little volumes. *Frailties of the Jury*, like the two preceding volumes, has to do with human nature, not on the bench or before the bar, but in an equally important place so far as the trial lawyer is concerned, —in the jury box. So many lawyers fail to notice or observe the eccentricities of human nature in the jury box that we believe a study of the book we have for review at this time would assist them materially in picking out a jury which would with less frequency fail to render justice to their clients. For the idea is not to be too slightly dismissed that a case is often won or lost in the selection of the jury to try the case. We have read this little volume with absorbing interest and considerable profit. We have in our own experience become already acquainted with a good many of the jurors whom Mr. Wilcox introduces to the reader in this work, to-wit: Phil Floater, always hanging round a court, anxious to be called and willing to decide a case; to the highest bidder; Jim Sport, a gambler, who has sunk all his sense of justice under his appetite for the game of chance and is willing to decide a case on the flip of a coin; Walter Whiteslave, who has no will of his own but is some rich merchant's man Friday who hangs upon his master's every nod and gesture and would fear to decide a case against his master's interest or the interest of any man or class of men in whom his master were interested; Jeremiah Jellyfish, Calvin Curiosity, Rush Hurryman, Anthony Saint, and many others.

Out of all these different portraits of jurymen we have selected that of Mr. Jeremiah Jellyfish as an illustration of the manner in which Mr. Wilcox has introduced his friends in the jury box. Of Mr. Jeremiah Jellyfish Mr. Wilcox has this say: "He was in youth instructed in the best of schools and made familiar with all moral precepts. He was a model son of model parents, taught in the lore of all the ages, and filled with all the facts of modern science. His were the graces that adorn the cultured, the arts and manners of gentility that pass as current coin at every counter. So general was his kindly sympathy that all accounted it a privilege to have his company. He spoke the right word in the proper place and did the fit thing when the time arrived. He mingled with the grave and gay and was enjoyed by all. No liquor ever touched his lips, and yet among the drinking and the drunk he found warm welcome. His character for morals bore no stain and yet the vicious oft invited him and at their orgies found his presence no reproof. A church of orthodox belief held him a member of a high repute; meanwhile he counted as his dearest friends agnostics of the strongest kind. In politics he bore a public part, aiding with voice and pen the party of his choice, but kept his words so free from bitterness that none opposed by him felt enmity. This rare and radiant man was sometimes summoned on a jury. How did his heavenly plumage fit the jury box? The evidence he understood, and court's instructions, and all the points brought out in argument he easily discerned, his memory carried well the load until the jury room was reached, and there he listened patiently to all his fellow-jurors had to say and modestly expressed his opinion. He had no bias or wish to favor either side, and formed a judgment on the facts presented, in strict accordance with the law, as given by the court. And such had been his verdict, but his fellow-jurors were moved by other motives. Inflamed to fever by the closing speech they had forgotten many facts and many others misremembered, and disregarding all the court's instruction, they were in haste to find a verdict, written by their indignation. This wise man sought to stay their haste and call them to the bar of reason, but found the effort vain. Their minds were set against the ground he took. He then tried several times to compromise and bring the others to him. He found them quite unyielding, but finally they moved a little way and he then went the rest and drank the bitter draught that they had mixed for him. Then with them went before the court and solemnly declared this base child of their bias was an offspring of his judgment. Thus was the law's intention set aside because this man of noble parts was lacking in the moral strength to stand by his own judgment. There frequently are jellyfish found on the jury, but rarely have they such a mental grasp. In many walks of life they fill their places well and in the march of human progress give great aid, but on the jury they become poor timber, likely to warp or break when strength is most required. For this they offer many reasons. Sometimes they urge expenses of another trial would put the party plundered in a worse condition; sometimes predict another jury would go further still in the wrong; oftentimes they put the blame upon the losing lawyer for not excusing certain jurors. When conscious guilt needs badly an excuse, none is too thin for service as its cloak. The jurors who desert the post of duty for bribes or fear or lack of moral strength, show often in their faces, when they hear the verdict read the signs of their debasement; they hang their heads in shame or carry

them too proudly, and when they answer to the usual questions asked they either speak too low, in sneaking accents, or else in tones of loud defiance, covering their guilty tracks with hummocks, that are easily seen."

The closing chapters of this little book are overflowing with many valuable suggestions for the selection and treatment of the jury, suggestions, indeed, that should prove very valuable to any trial lawyer.

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#### WILCOX ON FOIBLES OF THE BAR.

We never have read anything which has pleased us so hugely as the book we have for review at this time. And this pleasure which we have experienced has not been unmixed with profit. *Foibles of the Bar* is what its title indicates, a pillory on which is exposed the eccentricities of members of the legal profession. In this friendly expose of members of the legal profession Mr. Henry S. Wilcox, one of the honored members of the Chicago bar, has held the glass up to nature and portrayed the lawyer as he really is. In this respect he has done a noble service. Burns says:

"Would some power the gift to give us  
To see ourselves as others see us."

One of the lawyers to whom Mr. Wilcox introduces his readers, and one which mightily interested us, was Colonel Bombast whose characteristics Mr. Wilcox describes as follows:

"Colonel Bombast was a verbose lawyer. From youth he had shown such fluency of utterance, took such delight in talking, became so zealous and enthusiastic while thus engaged, had such a vocabulary of words on the end his tongue, was so ready with illustrations, quotations, and epigrammatic expressions, that everyone who knew him prophesied for him a great career. At sociables, clubs, and many public and private gatherings he was the center of an admiring throng, where he stood or sat with his thumbs in his vest holes and with his head thrown back, shaking vigorously, as he poured forth a perpetual torrent of words.

"When he was admitted to the bar many prophesied that he would become a great lawyer. Did they expect such a genius would examine critically the technicalities of the law and search among the roots of its doctrines to become familiar with their obscure origins, that he would deny himself the pleasure of talking to commune with the statutes and constitutions of his state and his nation, and the efforts that have been made from time to time by the courts to construe them? Would he be likely to scurry out at night to unfrequented localities, visit the hovels of wretchedness and interview their miserable occupants for the purpose of getting evidence to be used in a suit? Would he explore scientific books for the meaning of terms and procure the latest information relative to matters in a legal controversy? On the contrary, would he not set his sails to catch the sweetest zephyrs, and steer his easy sailing bark over the gentlest waters? And so he did. The ignorant public attracted by his mellifluous utterances trusted him with their cases. He assured them in boastful phrases that they were sure to win, and they believed him until, finally, as was usually the case, they met with disaster. Then he accounted for the result by charging the judge and jury with imbecility or corruption.

"His addresses abounded in the usual stock illustrations common to excessive talkers. In a speech delivered in defense of a tramp who had stolen a hand-sled, he referred to the Fall of Rome, the Goddess of Liberty, Christ before Pilate, a storm at sea, and the burning of Servetus by John Calvin. He spoke of 'God's green earth' many times, often appealed to the jury in the name of heaven, and wound up with the 'Sermon on the Mount.' Likewise, when defending a corporation for tapping a water pipe and stealing water from the city, he indulged in the same startling illustrations and closed with Christ's forgiveness of the erring woman as a reason why the jury should be merciful to the purloiner of the city water.

"When trying to humble the pride of a certain individual, he said: 'Gentlemen of the jury, who is this addleheaded ass with the ossified spine? I can tell you. When I came to this country he was tramping jimson weeds and pulling cockleburrs from his whiskers. He was then as poor as dishwater, and the wind whistled mournfully through his breeches. Then he was as meek as Moses and glad to fleece the stones for forage and be decent. Now look at him. Because an inscrutable Providence has removed him thirty days from the poorhouse, he struts like a turkeycock with the rickets, and assumes to give orders to God Almighty.'

"In the trial of his cases the Colonel was a terror to both court and jury, and it frequently happened he talked a good case to defeat. The human tongue is a nice instrument which to be used effectively must be handled with care. Every idle word is a waste. The person who must do much talking must devote much time to reading and reflection, or his speeches will become stale and tiresome. This applies with great force to the practice of law. The common blather-skite may sit on a drygoods box on the sunny side of a country store or wear out an arm chair in a hotel lobby and talk fluently relative to what the law ought to be and assume to know much about what the law really is, but the lawyer must examine statutes and constitutions and read extensively from reported cases before he is able to speak above a whisper on the subject, and then his words are likely to be very precise and guarded. The general public should beware of the verbose lawyer who, like an overloaded bag of wind, is perpetually blurring out opinions upon every question. The man who finds his chief delight in listening to his own voice should seek some other occupation where the rights, liberties, and estates of mankind are not put up in such jeopardy as they are when intrusted to the victim of this peculiar vice."

The closing chapters of the work give some very excellent advice to the barrister regarding his deportment in the trial of cases and in regard to the tactics which win lawsuits. It would be difficult for any lawyer to read this book and not be profited.

Printed in one volume of 163 pages and published by the Legal Literature Co., Chicago, Ill. Selling Agents: CENTRAL LAW JOURNAL Co., St. Louis, Mo.

#### SCANLAN'S RULES OF ORDER.

One of the neatest, clearest and most accessible books on parliamentary law is a little book just issued from the press entitled *Rules of Order for Societies, Conventions, Public Meetings and Legislative Bodies*, by Charles M. Scanlan, author of the *Law of Fraternities*, etc. In his introduction to this the second edition of this splendid little volume, the author gives the following account of the origin and author-

ity of what is known as rules of order: "Perhaps the first rule of order made by man was promulgated in Paradise, and provided that when Adam rose to speak, the house should be silent. Certainly ancient Ninevah, Egypt, Greece, Rome and Ireland had their rules of order in their deliberative assemblies. From the history, laws and records of any of those countries a full set of rules of order can be written.

The term 'parliamentary law,' as used in this country, is misleading inasmuch as it suggests that the English parliament enacted the rules of order and the United States adopted them. Now and then we hear a presiding officer spoken of as a good 'parliamentarian.' Strange as it may seem, the term parliamentary law is not in any dictionary published in England, and Murray's voluminous quarto 'New English Dictionary, 1905,' gives only the following definition of parliamentarian: 'One who accepts a religion or church ordained or ruled by parliament.' Elsyng, who compiled the first book on rules of order for the English parliament, gave it the title, 'The Form and Manner of Holding Parliament in England;' and Scobell published another work on the same subject, A. D. 1656, under the title 'Memorials of Method and Manner of Procedure in Parliament in Passing Bills.' Thomas Jefferson, while vice-president, wrote the first great American work on rules of order, which has been adopted by congress and most of the state legislatures under the title 'Jefferson's Manual.' The most philosophic and comprehensive treatise on rules of order is 'Cushing's Law and Practice of Legislative Assemblies.' Had he used the word rules instead of 'law,' it would seem particularly precise and appropriate. Law suggests a bill duly passed by a legislative body and approved by the executive; and rule, a matter in which the legislative body only is concerned. Consequently, 'Rules of Order' seems the proper title for a work of this kind."

It is evident that rules of order are not made by somebody and then applied, but that they are established by long continued usage of legislative bodies and decisions of our courts. In the absence of a rule to fit a case, the presiding officer must make a ruling, which, if followed for a long time, or affirmed by a court, becomes a rule of order. Thus rules of order are found in our law text-books and court decisions. However every organization may adopt a set of rules of its own, which, if reasonable and lawful, will govern it where there is a conflict with other rules.

Uniformity in minor particulars of rules of order is wanting because each house of congress and each legislature adopts special rules for its own procedure and their example is followed by societies. However, the rules of the house of representatives which is the greatest deliberative body in the country, are the highest authority outside of our courts, but require modification and elimination to adapt them to the wants of popular meetings and societies. The main things to attain are order and expedition of business, and the rules that secure these, govern best; but, for the purpose of securing freedom of speech and protecting the rights of the minority, dilatory motions are to be found in the best devised systems.

The great number of changes made in the rules of the house of representatives, and late decisions of courts, have rendered a new popular manual that will be authority in court, a necessity. It is to supply that want and to place the subject in a new and simpler form, that this revised and enlarged edition of Mr. Scanlan's manual—with changes and additions to bring it down to date—is published.

Printed in one small volume of 110 pages and published by Reic Publishing Co., Milwaukee, Wis.

## BOOKS RECEIVED.

**The Lunacy Law of the World**, being that of each of the forty-eight states and territories of the United States, with an examination thereof and leading cases thereon: together with that of the six great powers of Europe—Great Britain, France, Italy, Germany Austria-Hungary, and Russia. By J. A. Chaloner. Counsellor-at-Law. Palmetto Press: Roanoke Rapids, North Carolina. 1906. Review will follow.

## HUMOR OF THE LAW.

At a recent inquest in a Pennsylvania town, one of the jurors, after the usual swearing in, arose and with much dignity protested against service, alleging that he was the general manager of an important concern and was wasting valuable time by sitting as a juror at an inquest.

The coroner, turning to his clerk, said: "Mr. Morgan, kindly hand me 'Jervis' (the authority on juries)." Then, after consulting the book, the coroner observed to the unwilling juror:

"Upon reference to 'Jervis,' I find, sir, that no persons are exempt from service as jurors except idiots, imbeciles, and lunatics. Now, under which heading do you claim exemption?"—*Success.*

Congressman Sydney Mudd, of Maryland, is said to have told this story about an old negro who, by some peculiar election twist, was elected a justice of the peace in the backwoods of Georgia.

His first case happened to be one in which the defendant asked for a trial by jury. When the testimony was all in and the argument had been concluded, the lawyers waited for the judge to proceed with his instructions to the jury.

The justice seemed somewhat embarrassed. Finally one of the lawyers whispered to him that it was time to charge the jury.

Looking at the jury with a grim judicial air, the judge said:

"Gentlemen of the jury, sense dis is a very small case, I'll jes charge ye a dollar 'an a half apiece."

## WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.**

ALABAMA	4, 35, 37, 89, 57, 67, 72, 80, 51, 86, 100, 114, 141, 146
FLORIDA	.....8, 50, 52, 69, 85, 93, 122
GEORGIA	.....36, 62, 79, 80, 87, 91, 132, 144, 145
ILLINOIS	.....137
INDIANA	.....88, 43, 74, 76, 123, 135
IOWA	.....38, 55, 96, 102
LOUISIANA	.....2, 48, 54, 65, 71, 82, 88, 97, 110, 136
MASSACHUSETTS	.....61, 118
MINNESOTA	.....1, 7, 31, 47, 56, 89, 120, 121
MISSISSIPPI	.....107, 109, 126, 128, 140
NEBRASKA	.....30, 49, 53, 98, 106, 119, 129, 147, 150
NEW YORK	8, 10, 11, 13, 15, 21, 29, 40, 51, 64, 75, 78, 83, 95, 99, 101, 103, 105, 108, 109, 112, 116, 127, 142

NORTH CAROLINA.....	12, 41
SOUTH DAKOTA.....	63
UNITED STATES C. C.....	17, 32, 90, 115, 118, 125, 143
U. S. C. C. OF APP.....	6, 16, 22, 26, 42, 44, 68, 73, 124
UNITED STATES D. C.....	18, 19, 20, 23, 24, 25, 27, 29, 130, 131
VIRGINIA.....	5, 77, 92, 149
WEST VIRGINIA.....	9, 34, 45, 46, 53, 59, 60, 66, 133, 134, 135, 148
WISCONSIN.....	14, 70, 94, 104, 117, 139

1. ACTION—Joinder of Causes.—When several acts of negligence concur in giving rise to a single right of action, they may be united in the same complaint under Rev. Laws 1905, § 4154.—*Mayberry v. Northern Pac. Ry. Co.*, Minn., 110 N. W. Rep. 356.

2. ADVERSE POSSESSION—Tax Deeds.—Person who is unable to read, receiving a tax deed containing interlineations, held a possessor in good faith and protected by the prescription of 10 years.—*Hickey v. Smith*, La., 42 So. Rep. 762.

3. ANIMALS.—Trespass.—Where cattle go on lands of an adjoining owner from a highway, they may be driven from such land by the owner, and it is his duty to remove them with all reasonable speed.—*Wood v. Salder*, N. Y., 79 N. E. Rep. 858.

4. ADVERSE POSSESSION.—Husband and Wife.—The possession of land by a husband during the marriage held not adverse to the wife owning and in possession thereof at the time of marriage.—*Hinton v. Farmer*, Ala., 42 So. Rep. 563.

5. APPEAL AND ERROR—Certificate as to Evidence.—A certificate in a bill of exceptions, that "the evidence" was contained therein, was sufficient, where there was nothing to show that any part of the evidence was omitted.—*Manchester Home Bldg. & Loan Ass'n v. Porter*, Va., 55 S. E. Rep. 537.

6. APPEAL AND ERROR—Record.—A bill of exceptions which is certified by the trial judge to contain the substance of the testimony given on the trial is sufficient to enable the appellate court to pass on the question whether the court erred in refusing to direct a verdict.—*First Nat. Bank v. Moore*, U. S. C. C. of App., Ninth Circuit, 148 Fed. Rep. 953.

7. APPEAL AND ERROR—Supersedes Bond.—The supreme court has jurisdiction to direct appellant to give a new supersedeas bond, and, in case of his default, to vacate the stay when the original bond is clearly insufficient.—*Bock v. Sauk Center Creamery Co.*, Minn., 110 N. W. Rep. 257.

8. APPEAL AND ERROR—Transcript.—It is the duty of a party resorting to an appellate court to see that his transcript is properly prepared in compliance with the rules of court.—*Worley v. Dade County Security Co.*, Fla., 42 So. Rep. 527.

9. ASSIGNMENTS.—Order on Particular Fund.—Where an order is drawn for a certain sum to be paid out of a particular fund, and is not equal to the entire fund, it operates as an equitable assignment which equity will enforce.—*Wamsley v. Ward*, W. Va., 55 S. E. Rep. 998.

10. ASSOCIATIONS.—Effect of New Constitution.—By the adoption of a new constitution and by laws by unincorporated voluntary association former constitution and by laws are repealed.—*Bachman v. Harrington*, 102 N. Y. Supp. 406.

11. ASSOCIATIONS.—Trial of Member.—Member accused of violating the constitution and by laws of a voluntary organization held on his trial to raise the question of the adoption of new constitution and by laws.—*Bachman v. Harrington*, 102 N. Y. Supp. 406.

12. BAIL.—Habeas Corpus.—Where defendant, arrested on a body execution, had been discharged on *habeas corpus*, he could not thereafter be held on a surrender by his sureties.—*Ledford v. Emerson*, N. Car., 55 S. E. Rep. 969.

13. BAILMENT.—Negligence.—Plaintiff's loss of a vest and its contents while trying on another in a clothing store held the result of his own negligence for which the storekeeper was not responsible.—*Wamser v. Browning, King & Co.*, N. Y., 79 N. E. Rep. 981.

14. BANKRUPTCY.—Collateral Attack on Discharge.—Under Bankr. Act 1898, ch. 4, § 21, subd. "f." Act July 1, 1898, ch. 541, 30 St. 552 [U. S. Comp. St. 1901, p. 543], held, that a discharge in bankruptcy cannot be collaterally attacked.—*Custard v. Wigderson*, Wis., 110 N. W. Rep. 263.

15. BANKRUPTCY.—Debts Discharged.—Defendant's discharge in bankruptcy under Bankr. Act July 1, 1898, ch. 541, § 17, held no bar to an action on an agreement whereby defendant was to save plaintiff harmless from partnership debts.—*Ogilby v. Munro*, 101 N. Y. Supp. 753.

16. BANKRUPTCY.—Delay in Recording Chattel Mortgage.—A state statute which requires a conveyance or transfer to be recorded in order to be effectual against any class or classes of persons is a law by which such recording is "required" within the meaning of Bankr. Act.—*Loeser v. Savings Deposit Bank & Trust Co.*, U. S. C. C. of App., Sixth Circuit, 145 Fed. Rep. 975.

17. BANKRUPTCY.—Effect of Insolvent Proceedings Under State Law.—Proceedings under Act Pa. April 7, 1870 (P. L. 58), by which the franchise and property of an insolvent corporation are sold for distribution among its creditors, do not work a dissolution of the corporation so as to disenable its directors to admit its insolvency and willingness to be adjudged a bankrupt, which constitutes an act of bankruptcy under Bankr. Act.—*Cresson & Clearfield Coal & Coke Co. v. Stauffer*, U. S. C. C. of App., Third Circuit, 148 Fed. Rep. 931.

18. BANKRUPTCY.—Failure to Fulfill Agreement.—The fact that a bankrupt has failed to fulfill a composition agreement affords no ground for setting aside the composition, whatever its effect may be on the operation of the composition as a discharge.—*In re Eisenberg*, U. S. D. C., S. D. N. Y., 148 Fed. Rep. 325.

19. BANKRUPTCY.—Involuntary Proceedings.—Under Bankr. Act, July 1, 1898, ch. 541, § 18, valid service of the petition and subpoena in a proceeding for involuntary bankruptcy may be made where the defendant is temporarily absent from the district, but has his dwelling house therein by leaving copies there "with some adult person who is a member or resident in the family," as authorized in equity suits by Equity Rule 13.—*In re Norton*, U. S. D. C., N. D. N. Y., 148 Fed. Rep. 301.

20. BANKRUPTCY.—Partnership.—Where two persons each contributed to the capital employed in a mercantile business, which they conducted together under a company name, intending to incorporate, but never carrying out such intention, there was a partnership in fact between them in the business which may be adjudged a bankrupt and which is the owner of the property and assets of the common concern.—*In re Hudson Clothing Co.*, U. S. D. C., D. Me., 144 Fed. Rep. 805.

21. BANKRUPTCY.—Partnership Debts.—An individual member of a firm may obtain a discharge in bankruptcy, not only from his individual debts, but from his firm liabilities, without regard to the existence or nonexistence of firm assets.—*New York Institution for Instruction of Deaf & Dumb v. Crockett*, 102 N. Y. Supp. 412.

22. BANKRUPTCY.—Preferences.—Evidence considered, and held to support a finding that a chattel mortgage, given by a debtor within four months prior to his bankruptcy and when insolvent, did not constitute a voidable preference for the reason that the creditor did not know, nor have reason to believe, that a preference was intended.—*Hussey v. Richardson-Roberts Dry Goods Co.*, U. S. C. C. of App., Eighth Circuit, 145 Fed. Rep. 698.

23. BANKRUPTCY.—Proceedings for Contempt.—In a contempt proceeding to enforce obedience to an order requiring a bankrupt to pay over money to his trustee, the denial of the bankrupt that he has the money in his possession or under his control is not conclusive, but is entitled its due weight in connection with the other evidence to and circumstances shown.—*Moody v. Coole*, U. S. D. C., D. Me., 145 Fed. Rep.

24. BANKRUPTCY.—Provable Debts.—One who sold property on credit to a third person, who turned over to a corporation which did not become a party to the contract of sale did not thereby become a creditor of the corporation for the price, and entitled to prove a claim

against its estate in bankruptcy.—*In re Builders' Lumber Co.*, U. S. D. C., E. D. N. Car., 148 Fed. Rep. 244.

25. **BANKRUPTCY—Right to Rescind Sale of Goods to Bankrupt.**—A seller of goods cannot rescind the sale and reclaim the goods from the trustee in bankruptcy of the purchaser because the latter knew himself to be insolvent and unable to pay for the goods when they were delivered, unless he had such knowledge and an intention not to pay when they were bought.—*In re Levi & Picard*, U. S. D. C., S. D. N. Y., 148 Fed. Rep. 654.

26. **BANKRUPTCY—Sale of Assets.**—Where a receiver is directed to make a sale of assets by the court appointing him, the parties must recognize him as an officer of the court, and the court has power to enforce the contract in a summary manner.—*Mason v. Wolkowich*, U. S. C. C. of App., First Circuit, 150 Fed. Rep. 699.

27. **BANKRUPTCY—Suit by Trustee to Recover Property.**—The trustee of an individual bankrupt, held to have no equitable claim against property conveyed to a defendant by a bankrupt and defendant's husband, who had been partners and who owned it in common, together with other property of equal value which was at the same time deceded to the bankrupt's wife, on the ground that the conveyances operated as an equitable partition.—*Ludvig v. Umstadter*, U. S. D. C., S. D. N. Y., 148 Fed. Rep. 319.

28. **BANKRUPTCY—Unrecorded Mortgage.**—Under Ky. St. 1903, § 496, a mortgage withheld from record until shortly prior to the bankruptcy of the mortgagor is not valid as against his creditors, who became such during the time it was so withheld.—*In re Doran*, U. S. D. C., W. D. Ky., 148 Fed. Rep. 827.

29. **BANKS AND BANKING—Insolvency.**—Petitioner as one of the trustees of a bank deposit for the benefit of an incompetent held not entitled to an equitable set-off on the insolvency of the bank to the amount of such deposit against his individual debt to the bank.—*People v. German Bank*, 101 N. Y. Supp. 917.

30. **BENEFIT SOCIETIES—Pregnancy as Affecting Application.**—Where a married woman is the holder of a life insurance policy, it is not a false representation for her to sign a certificate that she is in sound bodily health, though she be pregnant, if the certificate is otherwise true.—*Merriman v. Grand Lodge, Degree of Honor, Neb.*, 110 N. W. Rep. 302.

31. **BENEFIT SOCIETIES—Validity of Regulations.**—Where the constitution and by-laws of an order require an appeal to the highest tribunal of the order, which meets in a foreign country three years from the time when the claim accrued, they are void.—*Lindall v. Supreme Court I. O. F., Minn.*, 110 N. W. Rep. 858.

32. **BILLS AND NOTES—Bona Fide Purchaser.**—The purchaser of a promissory note for value before maturity is not deprived of his character of bona fide purchaser unless he had knowledge of its invalidity as between the parties, or of facts which afford presumptive evidence of his bad faith.—*First Nat. Bank v. Moore*, U. S. C. C. of App., Ninth Circuit, 149 Fed. Rep. 953.

33. **BILLS AND NOTES—Parties.**—Where a note was payable to a bank by mistake instead of to the payee intended, and the bank indorsed the note without recourse to the latter, the bank never acquired any interest, and was not an assignor within Burns' Ann. St. 1901, § 277.—*Digan v. Mandel, Ind.*, 79 N. E. Rep. 889.

34. **BONDS—Presumption.**—In the absence of anything to the contrary it will be presumed that the intent of the parties was to execute a statutory bond as the statute requires.—*Chambers v. Cline*, W. Va., 55 S. E. Rep. 999.

35. **BROKERS—Employment.**—In an action by a real estate broker to recover for services in finding a purchaser for property, a count of the complaint held sufficient as to plaintiff's employment by defendant.—*Stephens v. Bailey & Howard, Ala.*, 42 So. Rep. 740.

36. **BURGLARY—Evidence.**—Where defendant's guilt was established by the testimony of an accomplice and corroborated by *aliunde* evidence, a conviction was authorized.—*Woods v. State, Ga.*, 55 S. E. Rep. 1044.

37. **CARRIERS—Negligence of Employees.**—It is a question for the jury whether a passenger whose hand is injured by having the car door shut on it is guilty of contributory negligence in placing his hand on the door jamb.—*Louisville & N. R. Co. v. Mulder, Ala.*, 42 So. Rep. 742.

38. **CEMETERIES—Right to Remove Body.**—Person burying dead in public cemetery, though doing so under a license, held entitled to maintain action against persons who, without right, disturb the bodies; and such right is not lost by the death of the licensee, but is transmitted to his heirs.—*Anderson v. Acheson, Iowa*, 110 N. W. Rep. 335.

39. **CHATTEL MORTGAGES—Rights of Mortgagor Before Maturity.**—Since the equity of a chattel mortgagor is subject to execution or attachment, and the officer has an exclusive right of possession and to remove the property from the debtor's premises, the creditor cannot be liable for trespass or trover for a taking under either process.—*J. C. Wilson & Son v. Curry, Ala.*, 42 So. Rep. 753.

40. **CONSTITUTIONAL LAW—Defective Sidewalks.**—Middletown City Charter, § 30, Laws 1902, p. 1376, ch. 572, requiring written notice to the city council of streets rendered defective by snow and ice as a condition precedent to right of action for injuries, held not unconstitutional as depriving persons injured, of a legal remedy for a wrong done them.—*MacMullen v. City of Middletown, N. Y.*, 79 N. E. Rep. 863.

41. **CONSTITUTIONAL LAW—Imprisonment for Debt.**—Under Const. art. 1, § 16, there can be no imprisonment to enforce payment of a debt under final process unless it has been adjudged on an allegation in the complaint and corresponding issue found that defendant has been guilty of fraud.—*Ledford v. Emerson, N. Car.*, 55 S. E. Rep. 969.

42. **CONSTITUTIONAL LAW—Kentucky Statute Regulating Racing.**—Act Ky., March 26, 1906, creating a state racing commission and regulating running races construed, and held not in violation of the fourteenth constitutional amendment as denying the equal protection of the laws.—*Grainger v. Douglas Park Jockey Club*, U. S. C. C. of App., Sixth Circuit, 148 Fed. Rep. 513.

43. **CONSTITUTIONAL LAW—Right of Attorney General to Appoint Assistant.**—Where a contract made by the attorney general for the appointment of an assistant was made without authority, and was invalid there was no contract to be protected by either the provisions of the federal or state constitutions.—*Hord v. State, Ind.*, 79 N. E. Rep. 916.

44. **CONTRACTS—Sale of Future Inventions.**—A contract by an inventor in consideration of his employment for a term of years at a salary to assign to his employer a half interest in all inventions made by him during the term is not contrary to public policy.—*Wright v. Vocalion Organ Co.*, U. S. C. C. of App., First Circuit, 148 Fed. Rep. 209.

45. **CONTRACTS—Trust Relation.**—Where contracting parties do not deal on equal terms, the burden is on one who exerts the dominating influence to show that any contract between such parties was entered into fairly, openly, voluntarily, and was well understood.—*Bailloz v. Higgins, W. Va.*, 56 S. E. Rep. 194.

46. **CORPORATIONS—Accommodation Indorsement.**—There is no presumption that the secretary of a corporation has power to bind the corporation as an accommodation indorser of his own promissory notes.—*Wheeling Ice & Storage Co. v. Connor, W. Va.*, 55 S. E. Rep. 982.

47. **CORPORATIONS—Doing Business in State.**—The sale and delivery of a single machine by a foreign corporation to a person within the state is not doing business with the state within Rev. Laws 1905, §§ 2888-2890.—*W. H. Lutes Co. v. Wyssong, Minn.*, 110 N. W. Rep. 367.

48. **CORPORATIONS—Insolvency.**—The manager, secretary, and treasurer of an insolvent mercantile corporation, whose accounts have never been settled, cannot recover on particular items necessarily involved in a general accounting.—*Hewitt v. Williams, La.*, 42 So. Rep. 786.

49. **COURTS—Adjournment of Term.**—The judge of the district court has power to adjourn a regular term of the court by an order sent to the clerk of the court before the time for holding the regular term.—*Russell v. State*, Neb., 110 N. W. Rep. 380.

50. **COURTS—Jurisdictional Amount.**—If the face of the record in an action at law brought in the court of the county judge shows that the amount demanded or actually put in controversy exceeds \$100, the county judge held without jurisdiction to entertain it.—*Seaboard Air Line Ry. v. Ray*, Fla., 42 So. Rep. 714.

51. **COURTS—Regularity of Proceedings.**—The United States District Court being a court of record proof of an order discharging a bankrupt raises the presumption that the court acquired jurisdiction, and that its proceedings were in conformity to law.—*New York Institution for Instruction of Deaf & Dumb v. Crockett*, 102 N. Y. Supp. 412.

52. **CRIMINAL EVIDENCE—Maps.**—A map shown to have been made from a survey to locate objects indicated, and to be an accurate map, is admissible in connection with testimony relevant to the case which the map illustrates or explains.—*Hisler v. State*, Fla., 42 So. Rep. 692.

53. **CRIMINAL EVIDENCE—Testimony of Accused.**—If defendant is a witness in his own behalf, it is error to instruct that if he has not denied any material fact proved in the case within his personal knowledge, such testimony is admitted by him to be true.—*Russell v. State*, Neb., 110 N. W. Rep. 380.

54. **CRIMINAL TRIAL—Excessive Sentence.**—Where a sentence was for a larger amount than that authorized by statute, the supreme court has jurisdiction on appeal to set it aside.—*State v. Smith*, Fla., 42 So. Rep. 791.

55. **CRIMINAL TRIAL—Leading Questions.**—The allowance of leading questions on the examination of prosecutrix in a trial for rape is not usually ground for reversal of conviction; the matter being largely within the discretion of the trial court.—*State v. Blackburn*, Iowa, 110 N. W. Rep. 273.

56. **CRIMINAL TRIAL—Right of Public Trial.**—Where spectators at a trial for rape are so obtrusive as to embarrass prosecuting witness, and it becomes apparent that the administration of justice is being impeded, the court may temporarily clear the court room of all persons except court officers, counsel, witnesses, and the defendant, without infringing on defendant's right to a public trial.—*State v. Callahan*, Minn., 110 N. W. Rep. 342.

57. **DAMAGES—False Imprisonment.**—In an action for false imprisonment, an instruction that, unless the jury believed that damages as a punishment should be awarded, then only actual damages should be awarded, and, if no actual damages were sustained, then the verdict should be for nominal damages, was misleading.—*Gambill v. Fuqua*, Ala., 42 So. Rep. 735.

58. **DEEDS—Delivery.**—There can be no acceptance of a deed by a vendee without a delivery thereof by or on behalf of the vendor.—*Garrett v. Goff*, W. Va., 56 S. E. Rep. 351.

59. **DEPOSITS IN COURT—Proceedings for Payment Out of Court.**—The judgment or decree directing a receiver to disburse a fund should show on its face that it is against him in his official character, and that the amount is to be paid out of the fund held by him in his official capacity.—*United States Blowpipe Co. v. Spencer*, W. Va., 56 S. E. Rep. 345.

60. **DESCENT AND DISTRIBUTION—Bringing Estate Into Hotspot.**—A descendant who has received an advance from a person dying intestate is not compelled to wait a year from the date of the order appointing the administrator before instituting a suit to bring the estate into hotspot, under Code 1900, § 3179.—*Meyer v. Meyer*, W. Va., 56 S. E. Rep. 209.

61. **DESCENT AND DISTRIBUTION—Jurisdiction of Land Court.**—Where the land court had jurisdiction to determine whether the omission of a testator to provide for

his children was intentional, the superior court also has jurisdiction of the question on appeal.—*Woodvine v. Dean*, Mass., 79 N. E. Rep. 882.

62. **DISMISSAL AND NONSUIT—Misjoinder of Defendants.**—Where a suit is brought against an insurance company and other defendants as principals on amendment to the petition showing that the other defendants were agents of the insurance company which had ratified the contract, it was proper to dismiss as to the other defendants.—*Lovelace v. Browne*, Ga., 55 S. E. Rep. 1041.

63. **DIVORCE—Allowance Pending an Appeal.**—Pending appeal with stay from decree for divorce and order for payments for maintenance and expenses held the supreme court would direct payments therefor.—*Drake v. Drake*, S. Dak., 110 N. W. Rep. 270.

64. **DIVORCE—Insanity as Defense for Adulterous Acts.**—Where defendant in suit for divorce for adultery denied the adulterous acts and pleaded insanity, she was not entitled to a trial of the issue of insanity to a jury.—*Wilcox v. Wilcox*, 101 N. Y. Supp. 528.

65. **DIVORCE—Money Demand.**—Though the divorce be denied, the court has jurisdiction of a money demand by the wife against the husband from the use of her paraphernal funds; the demand arising in the suit within Const. art. 63.—*Jenkins v. Maier*, La., 42 So. Rep. 722.

66. **DOWER—Property Subject.**—Where a grantor conveys land in trust, the income to be paid to him, reserving a power of disposition of the land in fee, his widow is entitled to dower in said land.—*Meyer v. Barnett*, W. Va., 56 S. E. Rep. 206.

67. **EQUITY—Jurisdiction.**—The jurisdiction of equity of a suit by tenants in common of standing timber against a co-tenant for an accounting held not ousted by the co-tenant setting up an issue of title.—*Gulf Red Cedar Lumber Co. v. Crenshaw*, Ala., 42 So. Rep. 564.

68. **ESTOPPEL—Enforcement at Law.**—The principles of equitable estoppel are now applied and enforced as liberally in courts of law as in courts of equity, and where equitable estoppel is available as a defense in equity it is equally available at law.—*Marine Iron Works v. Weiss*, U. S. C. C. of App., 5th Circuit, 148 Fed. Rep. 145.

69. **EVIDENCE—Opinion Evidence.**—An electrician of 17 years experience may testify whether precautions were necessary in repairing broken electric wires.—*Jacksonville Electric Co. v. Sloan*, Fla., 42 So. Rep. 516.

70. **EXECUTORS AND ADMINISTRATORS—Conversion by Heir.**—Where an heir has converted the funds belonging to the estate to his own use, the administrator is entitled to recover for conversion thereof, though the heir may be subsequently entitled to have a portion of the funds distributed to him.—*Palmer v. O'Rourke*, Wis., 110 N. W. Rep. 389.

71. **EXECUTORS AND ADMINISTRATORS—Costs.**—Where an applicant for appointment as an administrator or has caused an inventory to be made, the costs may be imposed on the mass, though the application be defeated by the co-heirs, and all other costs should be imposed on the applicant.—*Succession of Weincke*, La., 42 So. Rep. 776.

72. **FALSE IMPRISONMENT—Evidence.**—In an action for false imprisonment against a license inspector, evidence is admissible to show that the person making the arrest was plaintiff's deputy collector during the month in which the arrest was made.—*Gambill v. Fuqua*, Ala., 42 So. Rep. 735.

73. **FEDERAL COURTS—Receivers.**—A state statute prohibiting the appointment of nonresidents of the states as receivers applies only to its own courts, and cannot control the action of a federal court.—*City of Defiance v. McGonigale*, U. S. C. C. of App., Sixth Circuit, 150 Fed. Rep. 689.

74. **FIRE INSURANCE—Interest Insured.**—Where insured only had a life interest in the property insured, that was the only interest covered by the policy, and the value of the property destroyed when tested by such interest would be the measure of the insurer's liability.—*Glens Falls Ins. Co. v. Michael*, Ind., 79 N. E. Rep. 905.

75. **FIXTURES**—Landlord and Tenant.—Where a lease provides for the purchase by the lessor of a building erected by the lessee or the grant of a new lease, and a subsequent lease does not contain such provision, the building belongs to the lessor without payment.—*Precht v. Howard*, N. Y., 79 N. E. Rep. 847.

76. **FRAUDULENT CONVEYANCES**—Exempt Property.—The owner of property has the absolute right to transfer the same, and in doing so cannot legally be charged with defrauding his creditors, or with intent to do so.—*Starke v. Lamb*, Ind., 79 N. E. Rep. 895.

77. **FRAUDULENT CONVEYANCES**—Husband and Wife.—On an attack by the creditors of a husband on a conveyance by him to his wife during his insolvency, the burden is on the wife to show that the consideration was derived from a source other than her husband.—*Lewis v. Palmer*, Va., 56 S. E. Rep. 841.

78. **GUARDIAN AND WARD**—Revocation of Letters.—Letters of guardianship to aunt of minor orphan revoked, and minor committed to custody of grandparents.—*In re Crickard*, 102 N. Y. Supp. 440.

79. **HABEAS CORPUS**—Custody of Child.—In *habeas corpus* by a parent to recover custody of a child committed to a state charitable institution, it was error to exclude evidence tending to show that conditions had so changed since the judgment of commitment that parent was entitled to custody of the child.—*Kennedy v. Meara*, Ga., 56 S. E. Rep. 243.

80. **HIGHWAYS**—Obstructions.—An owner of land who permits travel across it on the road cannot place dangerous obstructions on such road without notice to those using it.—*Dunn & Lallande Bros. v. Gunn*, Ala., 42 So. Rep. 696.

81. **HOMICIDE**—Instructions.—A charge on a prosecution for assault with intent to murder, as to burden of proof, as to freedom from fault in bringing on the difficulty, held properly refused, as assuming defendant had shown facts putting such burden on the state, when it was a question for the jury.—*Wright v. State*, Ala., 42 So. Rep. 745.

82. **HUSBAND AND WIFE**—Paraphernal Funds.—The use of the paraphernal funds of the wife by the husband during the marriage creates a debt which she may sue for without asking for a dissolution of the community.—*Jenkins v. Maier*, La., 42 So. Rep. 722.

83. **INDIANS**—Telephone Poles on Reservation.—Laws 1902, p. 853, ch. 296, with reference to the erection of poles on an Indian reservation, held not unconstitutional as conflicting with Rev. St. U. S. § 2116, and Laws U. S. 1901 (Act March 3, 1901, ch. 832, § 1 Stat. 1058) regulating commerce among Indian tribes.—*Jemison v. Bell Telephone Co.*, N. Y., 79 N. E. Rep. 728.

84. **INFANTS**—State Institutions.—The general assembly has authority to authorize a charitable institution for the custody of children, provided for in Acts 1894, p. 80, to bind out to service a child committed to its care.—*Kennedy v. Meara*, Ga., 56 S. E. Rep. 243.

85. **INJUNCTION**—Irreparable Injury.—Equity may independent of statute enjoin the destruction of or injury to growing trees when the destruction would be irreparable injury to the owner of the land.—*Cowan v. Skinner*, Fla., 42 So. Rep. 780.

86. **INJUNCTION**—Laches.—Complainant being otherwise entitled to an injunction to prevent the overflowing of his land, his remedy is not barred by mere laches short of the period prescribed by the statute of limitations.—*Cobia v. Ellis*, Ala., 42 So. Rep. 751.

87. **INJUNCTION**—Restraining Criminal Acts.—The rule that equity will not interfere with the enforcement of criminal law does not deprive equity of its power to protect private property, nor defeat its right to enjoin a continuing injury to property or business.—*Hasbrouck v. Bondurant & McKinnon*, Ga., 56 S. E. Rep. 241.

88. **INSOLVENCY**—Rights of Insolvent.—An insolvent having been interdicted, his curator appealed from the

judgment appointing the sheriff syndic under Rev. St. § 1910. Held that curator had no legal standing to determine the rights of applicants for position of syndic.—*Conery v. His Creditors*, La., 42 So. Rep. 760.

89. **JOINT ADVENTURES**—Commission.—Commission earned by one party to a joint adventure held to inure to the benefit of all of his associates as a profit on the transaction, and they are entitled to share therein in proportion to the interest each had in the land involved.—*Church v. Odell*, Minn., 110 N. W. Rep. 346.

90. **JUDGMENT**—Estoppel.—A judgment for plaintiff's salary for the month of his discharge held not to estop plaintiff from the act of maintaining a suit for breach of his contract of employment.—*American China Development Co. v. Boyd*, U. S. C. C., N. D. Cal., 148 Fed. Rep. 258.

91. **JUDGMENT**—Res Judicata.—So long as a case is in *limine* and there is no estoppel of which the party filing *res adjudicata* may take advantage, the court may order it stricken as legally insufficient in matter of substance, or instruct the jury to disregard the defense.—*Gainesville & Dahlonga Electric Ry. Co. v. Austin*, Ga., 56 S. E. Rep. 254.

92. **JUDICIAL SALES**—Sale of Land by Trustee.—Rule to show cause why property should not be resold at costs and risk of former purchaser held proper to compel compliance with terms of sale by trustee in deed of trust.—*Richardson v. Jones*, Va., 56 S. E. Rep. 843.

93. **JURY**—Right to Trial by Jury.—The legislature cannot add to new right to injunction a further right to an accounting and an award of damages in equity thereby depriving the defendant of the right to a jury trial, unless the trespasses are such that equity could have enjoined them independent of the statute.—*Cowan v. Skinner*, Fla., 42 So. Rep. 730.

94. **LANDLORD AND TENANT**—Acts of Landlord.—Acts of lessor in notifying the lumber dealer who had agreed to sell material to lessee for improvement that the lessor would not be liable for it, and forbidding lessee's employees from proceeding with the building, held not a breach of the lease.—*Buhler v. Smith*, Wis., 110 N. W. Rep. 412.

95. **LANDLORD AND TENANT**—Injury to Tenant.—A tenant injured while using a common porch for her own purposes other than as a thoroughfare held not entitled to recover from the landlord for her injuries.—*Walsh v. Frey*, 101 N. Y. Supp. 774.

96. **LANDLORD AND TENANT**—Lien for Rent.—Landlord held not entitled to recover of surety of tenant holding mortgage from tenant proceeds of sale of mortgaged property applied to payment of tenant's debt.—*Overholzer v. Christensen*, Iowa, 110 N. W. Rep. 821.

97. **LARCENY**—Evidence.—Where a witness for the state gives an unexpected answer, embracing a negative statement by a third person, which cannot prejudice the accused, and which the jury are instructed to disregard, the conviction will not be set aside.—*State v. Broxton*, La., 42 So. Rep. 721.

98. **LIBEL AND SLANDER**—Question for Jury.—Unless words on which a charge of slander is based are plain and ambiguous, the meaning intended by defendant, and understood by those hearing him, should be left for the jury.—*Battles v. Tyson*, Neb., 110 N. W. Rep. 299.

99. **LIFE INSURANCE**—Prospectus.—A writing executed by a subinsurance agent prior to delivery of a semitontine policy held a mere prospectus, and insufficient to impose a liability on the insurer to pay the estimated accumulation dividends.—*Langdon v. Northwestern Mut. Life Ins. Co.*, 101 N. Y. Supp. 914.

100. **MALICIOUS PROSECUTION**—Questions for Jury.—In an action for wrongfully, maliciously, and without probable cause suing out an attachment, it was a question for the jury, whether defendant had made a full and fair statement to his counsel before making out the affidavit for attachment.—*Goldstein v. Drysdale*, Ala., 42 So. Rep. 744.

101. **MANDAMUS**—Reinstatement of Member in Benefit Society.—*Mandamus* will lie to reinstate an expelled member of a fraternal society, where the facts authorizing expulsion are disputed.—*People v. Independent Order Brith Abraham of the United States of America*, 101 N. Y. Supp. 866.

102. **MASTER AND SERVANT**—Duty to Warn of Danger.—The duty of a master operating a mine to warn employees of an expected explosion in blasting was one which could not be delegated to a fellow servant of the person injured.—*Hendrickson v. United States Gypsum Co.*, Iowa, 110 N. W. Rep. 322.

103. **MASTER AND SERVANT**—Fellow Servants.—Defendant's only obligation in the use of a machine being to replace a nut from time to time as it became loose, held, such replacing was a detail of the work which might be committed to an employee whose negligence would not make defendant liable.—*Loughlin v. Brassil*, N. Y., 79 N. E. Rep. 854.

104. **MASTER AND SERVANT**—Injury by Negligence of Foreman.—A member of a section crew held not to assume the risk of injury arising from the act of a foreman in lifting a hand car from the track.—*Hardt v. Chicago, M. & St. P. Ry. Co.*, Wis., 110 N. W. Rep. 427.

105. **MORTGAGES**—Default in Payment of Interest.—Holder of corporate bonds held not entitled to treat the corporation's failure to pay interest as a default starting the running of acceleration clause under the mortgage securing the bonds.—*Arnot v. Union Salt Co.*, N. Y., 79 N. E. Rep. 719.

106. **MORTGAGES**—Effect of Sale or Lease of Property.—Where a mortgage authorizes the mortgagor to make sales or leases for the benefit of the mortgagee a sale or lease under such authority is binding on the mortgagee and those claiming under him.—*Sammons v. Kearney Power & Irrigation Co.*, Neb., 110 N. W. Rep. 805.

107. **MORTGAGES**—Subrogation.—A deed of trust held extinguished by a payment, notwithstanding its assignment to another, so that the latter was not entitled to subrogation to the rights of the assignor for the purpose of defeating a junior lien on the property.—*Ramoned Bros. v. Loggins*, Miss., 42 So. Rep. 669.

108. **MOTIONS**—Conclusiveness of Order.—A motion once made and denied by the court held not entitled to be renewed without leave of court on substantially the same facts.—*Haskell v. Moran*, 102 N. Y. Supp. 885.

109. **MUNICIPAL CORPORATIONS**—Law of the Road.—The law of the road does not apply to a collision between a bicycle and a wagon on a street before the driver of the wagon has an opportunity to straighten his vehicle after driving upon the street from an alley.—*Dickinson v. Platt*, 101 N. Y. Supp. 956.

110. **MUNICIPAL CORPORATIONS**—Ordinance as to Leaky Water-Mains.—A city ordinance requiring all water-works companies and operators of water pipes to prevent the same from remaining in a leaky condition for more than two days at a time held not void for lack of uniformity.—*Crumpler v. City of Vicksburg*, Miss., 42 So. Rep. 673.

111. **MUNICIPAL CORPORATIONS**—Ordinance Regulating Hucksters and Peddlers.—An ordinance requiring all persons who carry on business in the public streets to carry it on with propriety, and good manners, and relating to a class, is neither unreasonable nor discriminative.—*City of Shreveport v. Dantes*, La., 42 So. Rep. 716.

112. **NEGLIGENCE**—Carbonic Acid Gas.—In an action against a druggist for injuries caused by the explosion of a glass bottle, an instruction held erroneous as eliminating the element of due care required of the druggist.—*Bruckel v. J. Milhau's Son*, 102 N. Y. Supp. 395.

113. **NUISANCE**—Acts Constituting.—To cause a current of hot or impure air or air charged with offensive odors to strike upon plaintiff's window is a nuisance if the plaintiff elects to keep the window open.—*Vaughan v. Bridgham*, Mass., 79 N. E. Rep. 739.

114. **NUISANCE**—Nature and Elements.—The existence of a privy of itself amounting to a nuisance plaintiff is entitled to recover notwithstanding there was no negligence in its construction.—*Town of Vernon v. Edgeworth*, Ala., 42 So. Rep. 749.

115. **PATENTS**—Anticipation.—A patent is not anticipated by prior patents for devices which might by slight modifications have been made to perform the functions of that of the later patent, where it does not appear that the patentees had in mind their use or adaption to accomplish such result.—*Gunn v. Bridgeport Brass Co.*, U. S. C. C., S. D. N. Y., 148 Fed. Rep. 239.

116. **PLEADING**—Matters to be Proved.—Where a complaint states a cause of action on a contract which is sustained by proof, the plaintiff is entitled to recover, though the complaint also contains allegations of a tort in respect to which there is a complete failure to prove a cause of action.—*Connor v. Philo*, 102 N. Y. Supp. 427.

117. **PRINCIPAL AND AGENT**—Authority of Agent.—General agent of railway company held to have power to give watchman authority to make investigation as to damage done the company's property.—*Johnston v. Chicago, St. P., M. & O. Ry. Co.*, Wis., 110 N. W. Rep. 424.

118. **PRINCIPAL AND AGENT**—Unauthorized Deed by Attorney.—A deed to property made by one holding a power of attorney from the legal owner, in plain violation of the intent of the power, well known to both the grantor and grantee, is ineffective to convey any interest.—*Holmes v. Dowle*, U. S. C. C., N. D. Ill., 145 Fed. Rep. 634.

119. **PRINCIPAL AND SURETY**—Building Contracts.—Where a building contractor defaults, and the surety on his bond completes the building, he does not stand in the position of assignee as to the reserve in the hands of the owner, or other moneys due or to become due the contractor, but as an original party.—*First Nat. Bank v. School Dis. No. 1*, Neb., 110 N. W. Rep. 349.

120. **PROPERTY**—Authority to Locate Building on Land of Another.—Ownership and possession being shown of building located on the land of another, it will not be presumed that the building was so located without authority.—*Jones v. Great Northern Ry. Co.*, Minn., 110 N. W. Rep. 260.

121. **PUBLIC LANDS**—Railroad Grants by State.—Where plaintiff had purchased lands from the state and had paid therefor he was entitled to recover for logs cut from the land, though the patent for the land was not issued until after an action by him to recover for such logs.—*White & Street Townsite Co. v. J. Nellis Lumber Co.*, Minn., 110 N. W. Rep. 371.

122. **RAILROADS**—Communicated Fires.—To constitute actionable negligence in allowing a burning by fire communicated from a locomotive there must be alleged negligence in the circumstances that would cast a duty on the railroad company to put out the fire.—*Atlantic Coast Line R. Co. v. Benedict Pineapple Co.*, Fla., 42 So. Rep. 529.

123. **RAILROADS**—Injury to Person on Track.—Whether a person injured by being run over by one of defendant's trains while attempting to cross its railroad tracks was on such tracks as a mere licensee or by invitation held under the evidence to be a question for the jury.—*Pittsburgh, C. & St. L. Ry. Co. v. Simons*, Ind., 79 N. E. Rep. 911.

124. **RECEIVERS**—Unsecured Claims.—Holders of unsecured claims for damages arising from negligence of a mortgagor railroad company prior to the appointment of receivers have no equity which entitles them to priority of payment over the mortgage creditors.—*Atchison, T. & S. F. Ry. Co. v. Osborn*, U. S. C. C. of App., Eighth Circuit, 148 Fed. Rep. 606.

125. **REMOVAL OF CAUSES**—Federal Courts.—Although a plaintiff cannot invoke the exercise of the jurisdiction of a federal court in a district of which neither he nor defendant is an inhabitant, where he sues in such district in a state court the defendant may invoke the exer-

cise of such jurisdiction by removal if the requisite grounds of removal exist.—Manufacturers' Commercial Co. v. Brown Alaska Co., U. S. C. C. S. D. N. Y., 148 Fed. Rep. 808.

126. **REPLEVIN**—Claims of Third Persons.—The remedy of a third party claimant of a portion of the personal property sued for in replevin held a bill in equity, and not by intervention in replevin suit.—McCracken v. Lewis, Miss., 42 So. Rep. 671.

127. **SALES**—Conditional Sales.—That a vendee of real estate unlawfully removed an engine from the property without the vendor's consent, such fact did not affect the rights of a seller of a new engine by which the old one was replaced under a contract of conditional sale thereof.—Davis v. Bliss, N. Y., 79 N. E. Rep. 851.

128. **SALES**—Remedy of Seller on Resale by Buyer.—A seller in a conditional sale held not estopped from asserting title both as against his buyer and any person claiming under him.—Watts v. Ainsworth, Miss., 42 So. Rep. 672.

129. **SEDUCTION**—Lewdness.—In a prosecution for seduction, evidence of specific acts of lewdness on the part of the prosecuting witness is incompetent. If she was of good repute prior to the alleged crime, she is within the protection of the statute.—Russell v. State, Neb., 110 N. W. Rep. 880.

130. **SHIPPING**—Charter Party.—A vessel held liable for breach of charter because of delay in reporting for cargo, caused by the necessity for repairs to make her seaworthy for the voyage.—Heller v. Pendleton, U. S. D. C., S. D. N. Y., 148 Fed. Rep. 1014.

131. **SHIPPING**—Steam Vessels Crossing.—An out-going ocean steamer from North river and a tug with a car float in tow on her side bound from Jersey City to the East river bottom held in fault for a collision between them on the ground that neither had an efficient lookout and neither signaled the other.—The Tugboat No. 4, U. S. D. C., S. D. N. Y., 148 Fed. Rep. 1007.

132. **SLAVES**—Custody of Child.—Law authorizing child to be bound to service by state agencies under proper restrictions held not a violation of provisions which prohibit slavery and involuntary servitude, except as a punishment for crime after conviction thereof.—Kennedy v. Meara, Ga., 56 S. E. Rep. 243.

133. **SPECIFIC PERFORMANCE**—Deed of Married Woman.—Equity cannot decree specific performance of the executory contract of married woman to convey land when not acknowledged before an officer.—Simpson v. Belcher, W. Va., 56 S. E. Rep. 211.

134. **SPECIFIC PERFORMANCE**—Partial Performance.—Where a partial performance by plaintiff of a contract for the exchange of land cannot be had in its exact terms, defendant held entitled to performance thereof with abatement for the deficiency in the land.—Garrett v. Goff, W. Va., 56 S. E. Rep. 351.

135. **STATES**—Contracts.—A person dealing with a state officer whose power to bind the state depends on a statute is charged at his peril with notice of the scope of the power of the officer under the statute.—Hord v. State, Ind., 79 N. E. Rep. 916.

136. **TAXATION**—Inheritance Tax.—The surviving spouse does not acquire a usufruct in the estate of the deceased spouse by inheritance, so that it is not subject to the inheritance tax.—Succession of Marsal, La., 42 So. Rep. 778.

137. **TAXATION**—Presumptions.—Where, on a bill to enjoin the collection of taxes for several years, neither the appropriation nor the levy ordinance for one of such years was in the record, it will be presumed that for that year proper ordinances were passed and the taxes levied in conformity to law.—Shriver v. McGregor, Ill., 79 N. E. Rep. 706.

138. **TAXATION**—Tax Deed.—Tax deed, being *prima facie* evidence of title to the land thereby conveyed in the grantee thereof as against such persons as could have redeemed it from the sale within one year from its date thereof, held to be set aside by such person only by

proof of a fatal defect in the proceedings.—Hogan v. Piggott, W. Va., 56 S. E. Rep. 189.

139. **TELEGRAPHS AND TELEPHONES**—Negligence in Permitting Guy Wire to Sag.—A telephone company held negligent in permitting a guy wire to sag so that it was only 13 feet above the traveled track of a highway, in violation of Rev. St. 1898, §§ 13294, 1778, which resulted in injury to plaintiff's thrasher.—Chant v. Clinton Telephone Co., Wis., 110 N. W. Rep. 423.

140. **TELEGRAPHS AND TELEPHONES**—Punitive Damages.—Failure of a telephone company to secure telephonic communication for plaintiff held not a willful wrong justifying the recovery of punitive damages.—Cumberland Telephone Co. v. Allen, Miss., 42 So. Rep. 666.

141. **TENANCY IN COMMON**—Adverse Possession.—Where one of the several tenants in common executes a deed to a third person purporting to convey absolutely the entire estate, the possession of the third person under the conveyance is adverse to the co tenants.—Guif Red Cedar Lumber Co. v. Crenshaw, Ala., 42 So. Rep. 564.

142. **TRADE MARKS AND TRADE NAMES**—Union Label.—A label adopted by a union of employees to designate the product of the members thereof held to include the labor of the members of subordinate councils, within Labor Law, Laws 1897, p. 466, ch. 415, § 15.—Lynch v. John Single Paper Co., 101 N. Y. Supp. 824.

143. **TRADE MARKS AND TRADE NAMES**—What Constitutes.—The name "White House" and the picture of the White House at Washington, constitutes a valid trademark and trade name for coffees.—Dwinell-Wright Co. v. Co-operative Supply Co., U. S. C. C. E. D. Pa., 148 Fed. Rep. 242.

144. **TRIAL**—Objections to Evidence.—Where a question was asked and on objection rejected, counsel should be allowed to show what the witness would answer, and it is within the discretion of the court to cause the jury to retire and allow the witness himself to state what his answer would be.—Holland v. Williams, Ga., 55 S. E. Rep. 1023.

145. **TRIAL**—Separable Counts.—It was not incumbent on the court, in its charge to the jury, to deal separately with the two counts in the petition, nor to instruct the jury to inform the court on which count they found for plaintiff.—Gainesville & Dahlonga Electric Ry. Co. v. Austin, Ga., 56 S. E. Rep. 254.

146. **TROVER AND CONVERSION**—Necessity for Demand of Property.—Where mortgaged property taken into an officer's custody under execution was released and the debtor notified thereof, in the absence of a demand for delivery, the officer's retention of possession was not a conversion.—J. C. Wilson & Son v. Curry, Ala., 42 So. Rep. 753.

147. **TRUSTS**—Enforcement of Constructive Trust.—Where a father gave certain property to his son under an agreement by the son to pay a certain sum to his sister, and he died without doing so, an action to enforce the trust could be maintained by the sister in her own name, though the parent was still living.—Fox v. Fox, Neb., 110 N. W. Rep. 304.

148. **TRUSTS**—Resulting Trust.—To charge a person as trustee, by reason of his purchase of land, on the theory that when he purchased he was attorney for a party claiming the land in a suit involving it, it must appear that he was attorney during the pendency of the suit.—Jackson v. Strader, W. Va., 56 S. E. Rep. 177.

149. **UNITED STATES**—Contracts.—A person furnishing materials to a contractor under contract with the United States held not entitled to sue in the name of the United States for his benefit on a bond given by the contractor, unless a federal statute authorizes it.—Penn Iron Co. v. William E. Trigg Co., Va., 56 S. E. Rep. 329.

150. **WATERS AND WATER COURSES**—Discrimination by Water Company.—A corporation formed to supply water or water tower is a *quasi* public corporation and bound to serve the public without unjust discrimination.—Sammons v. Kearney [Power & Irrigation Co., Neb., 110 N. W. Rep. 308.